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SHOULD STATE COURTS DEPART FROM THE FOURTH AMENDMENT IN CONSTRUING
THEIR OWN CONSTITUTIONS, AND IF SO, ON WHAT BASIS BEYOND SIMPLE
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FOREWORD
2007 FOURTH AMENDMENT SYMPOSIUM

**INDEPENDENT STATE GROUNDS:
SHOULD STATE COURTS DEPART FROM
THE FOURTH AMENDMENT IN
CONSTRUING THEIR OWN
CONSTITUTIONS, AND IF SO, ON WHAT
BASIS BEYOND SIMPLE DISAGREEMENT
WITH THE UNITED STATES SUPREME
COURT'S RESULT?**

*Thomas K. Clancy**

The National Center for Justice and the Rule of Law,¹ which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. Perhaps no other amendment has such broad applicability to everyday life as does the Fourth Amendment. The Fourth Amendment is also a very complicated area of jurisprudence and the legal landscape is

* Director, National Center for Justice and the Rule of Law, and Research Professor, University of Mississippi School of Law.

¹ The National Center for Justice and the Rule of Law is supported by a grant from the Bureau of Justice Assistance, Office of Justice Programs, of the United States Department of Justice. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles stemming from this symposium are those of the author and do not represent the official position of the United States Department of Justice. For more information about the Center, please visit www.ncjrl.org.

constantly changing as a result of new technology and court decisions. The purpose of the Center's *Initiative* is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

A central pillar of the *Initiative* is its annual symposium on important search and seizure topics. On March 30, 2007, the Center hosted its fifth annual symposium on the Fourth Amendment. The symposium coincided with the second day of a conference entitled *The Fourth Amendment: Contemporary Issues for Appellate Judges*, sponsored by the Center in cooperation with the National Judicial College, which was attended by approximately forty appellate judges from almost as many states. They were joined for the symposium by lawyers, law students, and law professors, along with persons observing the symposium via the Internet. The Center believes that the symposium—and the insightful articles published in this special edition of the *Mississippi Law Journal* that stemmed from the presentations at that event—significantly further the Center's mission and, more importantly, make significant contributions to the understanding of search and seizure principles. The Center, and I personally, wish to thank the leading legal scholars who participated.

The symposium addressed a difficult question for state courts. Justice Souter, while serving as a justice on the Supreme Court of New Hampshire, aptly described the dilemma facing state courts: "If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent."² As the articles contained in this edition of the *Mississippi Law Journal* demonstrate, the difficulty is particularly acute in the search and seizure area, due to a confluence of many historical and contemporary developments.

² *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially).

State constitutional search and seizure provisions vary significantly. There are some unique textual differences, particularly among the original thirteen colonies, although many of the more modern search and seizure provisions are remarkably similar to the Fourth Amendment. Those provisions are ably analyzed in the final article to this symposium, *Survey: State Search and Seizure Analogs*, written by Michael Gorman. Mr. Gorman provides the reader with a “walking stick, a rigid—but sturdy—companion for researchers exploring state constitutionalism,”³ wherein he sets forth the various constitutional provisions and outlines each jurisdiction’s doctrine, as articulated by its appellate courts.

With few exceptions, state appellate courts did not develop a significant body of search and seizure jurisprudence prior to 1961. In that year, by mandating that the federal exclusionary rule was applicable to the states, *Mapp v. Ohio*⁴ largely federalized search and seizure jurisprudence. To that end, for the better part of a decade, the Warren Court dramatically altered Fourth Amendment principles, including, for example, changing the nature of the protected interest from property to privacy,⁵ expanding coverage of the amendment (ranging from administrative inspections⁶ to many everyday street encounters⁷), imposing new standards by which to measure reasonableness, and articulating a broadly applicable exclusionary rule,⁸ with the apparent ability of defendants to vicariously assert the rights of others.⁹ The Burger and the Rehnquist Courts modified and cut back on much of the Warren Court’s search and seizure jurisprudence, including restricting the concepts of a search¹⁰ and a seizure,¹¹ de-constitutionalizing¹² and restricting the application

³ Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

⁴ 367 U.S. 643 (1961).

⁵ *Katz v. United States*, 389 U.S. 347 (1967).

⁶ *E.g.*, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁸ *E.g.*, *Mapp*, 367 U.S. 643.

⁹ *E.g.*, *Jones v. United States*, 362 U.S. 257 (1960).

¹⁰ *E.g.*, *United States v. Place*, 462 U.S. 696 (1983) (excluding dog sniffs from the definition of a search); *United States v. Jacobsen*, 466 U.S. 109 (1984) (excluding chemical testing of substance for presence of illegal drugs from definition of a search).

¹¹ *E.g.*, *California v. Hodari D.*, 499 U.S. 621 (1991).

of the exclusionary rule,¹³ and adapting the Warren Court's reasonableness standards to be very government-friendly.¹⁴

In 1977, Justice Brennan, a chief architect of the Warren Court's search and seizure jurisprudence, urged state courts to turn to their own constitutions to avoid the impact of the conservative counter-revolution.¹⁵ That call has been heeded to some extent but, frankly, much of the state court analysis often appears to be little more than adopting a dissenting view in a United States Supreme Court case or maintaining a Warren Court analysis in lieu of a more current high Court precedent.¹⁶ What strikes me as important is that, prior to *Mapp*, there was little state law-based search and seizure principles being generated that favored individual rights. Thus, to depart from federal precedent in this era, state courts are not returning to a golden age of protecting individual rights. They are, instead, often reacting to a perceived change in federal interpretation that is less favorable to individuals than had been apparent in Warren Court opinions. There was, I posit, little in the pre-*Mapp* case

¹² *United States v. Calandra*, 414 U.S. 338 (1974).

¹³ *E.g.*, *Rakas v. Illinois*, 439 U.S. 128 (1978).

¹⁴ *See generally* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977 (2004).

¹⁵ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

¹⁶ For example, a large number of state courts reject the Supreme Court's restrictive definition of a seizure contained in *California v. Hodari D.*, 499 U.S. 621 (1991), on state constitutional grounds. *See Joseph v. State*, 145 P.3d 595, 605 (Alaska Ct. App. 2006); *State v. Oquendo*, 613 A.2d 1300, 1310 (Conn. 1992); *Jones v. State*, 745 A.2d 856, 869 (Del. 1999); *State v. Quino*, 840 P.2d 358, 364 (Hawaii 1992); *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999); *Commonwealth v. Stoute*, 665 N.E.2d 93, 94-98 (Mass. 1996); *Welfare of E.D.J.*, 502 N.W.2d 779, 781-83 (Minn. 1993); *State v. Clayton*, 45 P.3d 30 (Mont. 2002); *State v. Tucker*, 642 A.2d 401, 405 (N.J. 1994); *State v. Beauchesne*, 868 A.2d 972 (N.H. 2005); *People v. Bora*, 634 N.E.2d 168, 169-70 (N.Y. 1994); *State v. Puffenbarger*, 998 P.2d 788 (Or. Ct. App. 2000); *Commonwealth v. Matos*, 672 A.2d 769, 776 (Pa. 1996); *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002); *State v. Young*, 957 P.2d 681, 686-87 (Wash. 1998). The Supreme Court of Louisiana has also rejected *Hodari D.* as the sole standard to determine when a seizure occurs and has added, for the purpose of the Louisiana Constitution, the additional protection against "imminent actual stops." *State v. Tucker*, 626 So. 2d 707, 712 (La. 1993). Indeed, the Court's decision in *Hodari D.* may be the single most important event persuading state courts to depart from Supreme Court opinions in construing their own constitutions. Yet, the reasoning of the courts rejecting *Hodari D.* generally has not broken new ground but has instead simply expressed a preference for pre-*Hodari D.* case law as a more proper measure of when a seizure occurs. The courts typically rely on the dissent in *Hodari D.* and the case law preceding that decision.

law on the state level that offered more protection to individuals than the Fourth Amendment did. On the other hand, a vibrant and principled development of search and seizure principles by state courts, unshackled by current Supreme Court doctrine, may bring new meaning and vibrance, ultimately influencing the high Court's development of Fourth Amendment principles. So what are state courts to do? Where do they turn to find an alternative framework? Hence the title for this symposium: "*Independent State Grounds: Should State Courts Depart from the Fourth Amendment in Construing Their Own Constitutions, and if so, on What Basis Beyond Simple Disagreement with the United States Supreme Court's Result?*"¹⁷

Four appellate judges from four jurisdictions, each with different legal frameworks to analyze search and seizure claims, have taken on the task of addressing this question. The Honorable Jack Landau, of the Court of Appeals of Oregon, comes from a state with perhaps the most highly developed independent state grounds, with strong language in its own constitution supporting its analytical approach. His article, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, begins by addressing the abstract question—should any state depart from the Fourth Amendment? Judge Landau, however, notes at the outset that that is the wrong question. In his view, the proper question is not whether state search and seizure provisions "*should* depart from Federal Fourth Amendment case law. The proper question is whether state constitutions *do* depart from Federal Fourth Amendment case law. The question, in other words, is what state constitutions *mean*."¹⁸ He sees the matter as not one of choice but a "question of state constitutional interpretation, determined in the way judges on state courts ordinar-

¹⁷ States can afford more protection to individuals than the Fourth Amendment does but if the state constitution is construed to offer less, the Fourth Amendment serves as a floor. *E.g.*, *Arkansas v. Sullivan*, 532 U.S. 769 (2001). Hence, for state judges, the question is whether the state constitution should be construed to afford more protection to individuals than the Fourth Amendment.

¹⁸ Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, 77 *MISS. L.J.* 369, 369-70 (2007).

ily determine the meaning of their state constitutions.”¹⁹ He discusses at some length the significance of state constitutions in general and search and seizure provisions in particular. Among other points he makes, he rejects the view that “interpretation of search and seizure provisions is intrinsically different from the interpretation of other provisions of state constitutions.”²⁰ He then provides an overview of the search and seizure law in Oregon and concludes that the Oregon experience is “an example of how one state has departed from the Fourth Amendment regularly and survived to tell the tale.”²¹

The Honorable Joseph Grasso, of the Massachusetts Appeals Court, comes from a state—actually a commonwealth—whose constitution produced the model for the Fourth Amendment. The model was written by John Adams and remains today embodied in Article 14 of the Massachusetts Declaration of Rights. Here is a state with a longer constitutional heritage on search and seizure than the United States Constitution. His article, “*John Adams Made Me Do It*”: *Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts’ Declaration of Rights*, traces “the common constitutional DNA in art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment,”²² explores the Massachusetts cases departing from United States Supreme Court interpretation (including the debate whether invocation of Article 14 is a “pure policy judgment or a principled application” of the Massachusetts Supreme Judicial Court’s independent authority to analyze its own state’s constitution),²³ and “posits that the methodological label for assessing the resort to state constitutional principles is less important than whether the resulting decision is faithful to the manner in which judges should decide cases and make law.”²⁴

The Honorable Michael E. Keasler, of the Texas Court of Criminal Appeals, comes from a state that has an analog with

¹⁹ *Id.* at 370.

²⁰ *Id.* at 385.

²¹ *Id.* at 369.

²² Joseph A. Grasso, Jr., “*John Adams Made Me Do It*”: *Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts’ Declaration of Rights*, 77 MISS. L.J. 315, 318 (2007).

²³ *Id.*

²⁴ *Id.*

language identical to the Fourth Amendment. Texas courts have, almost uniformly, construed the state provision consistent with United States Supreme Court precedent. His article's premise is stated in its title: *The Texas Experience: A Case for the Lockstep Approach*. Judge Keasler outlines the evolution of Texas search and seizure jurisprudence, including (with limited exceptions) its historical lack of the use of independent state grounds. He observes that "those who advocate state expansion of the protections afforded by the Constitution of the United States often disregard the rights of the victims and potential victims and fail to critically examine the justification for, and ramifications of, the exclusionary rule."²⁵ He asserts that such advocates "do not consider whether legislation permitting lawsuits against governmental entities serves as more of a deterrent to police misconduct than the exclusionary rule."²⁶ Judge Keasler concludes: "The United States Constitution as interpreted by the Supreme Court of the United States adequately protects the right of the individual to be free from unreasonable searches and seizures, while, at the same time, protecting society from predators."²⁷

The Honorable Irma Raker, of the Court of Appeals of Maryland, comes from another of the original thirteen colonies. Maryland's search and seizure provision dates to the colonial era. That provision, Article 26 of Maryland's Declaration of Rights, explicitly regulates only the issuance of warrants; it has no reasonableness clause. Accordingly, Maryland is one of a few states that have a weak linguistic basis for departing from the Fourth Amendment. In her article, *Fourth Amendment and Independent State Grounds*, Judge Raker observes that Maryland has not resolved search and seizure issues on independent state grounds and continues to interpret Article 26 *in pari materia* with the Supreme Court's interpretation of the Fourth Amendment. She traces Maryland appellate court treatment of the two search and seizure provisions, including the evolution of the

²⁵ Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 MISS. L.J. 345, 367-68 (2007).

²⁶ *Id.* at 368.

²⁷ *Id.*

exclusionary rule in Maryland jurisprudence. Surveying those considerations, Judge Raker concludes that, “at least as of today, Maryland continues to resolve search and seizure issues arising under Article 26 of the Maryland Declaration of Rights in accordance with the jurisprudence of the United States Supreme Court and its interpretation of the Fourth Amendment.”²⁸

Professor Thomas Davies, of the University of Tennessee School of Law, who is known for his historical research, offers an article entitled: *Correcting Search and Seizure History: Now-Forgotten Common-Law Arrest Standards and the Original Understanding of “Due Process of Law.”* In the article, Professor Davies states: “Because the Federal Supreme Court has adopted a fairly minimalist view of search-and-seizure protections during recent decades, the practical question is whether it is appropriate for state courts to construe state constitutions to provide stronger state search-and-seizure protections than the federal protections.”²⁹ His article “assesses the implications that the history of search-and-seizure doctrine holds for that question.”³⁰ He extensively analyzes historical events from early times, colonial-era history, the drafting of constitutional provisions, post-framing “transformation of criminal procedure,” to the Supreme Court’s late nineteenth and early twentieth century cases. Professor Davies offers non-conventional interpretations of much of those legal developments. He maintains that much of “the historical claims in recent Supreme Court search-and-seizure rulings usually amount to only fictional originalism” and that “history does not oblige state courts to defer to the Federal Supreme Court’s construction of search-and-seizure rights.”³¹

Robert Williams, a leading scholar on state constitutional law and Distinguished Professor of Law, Rutgers University School of Law, Camden, contributes *State Constitutional Meth-*

²⁸ Irma S. Raker, *Fourth Amendment and Independent State Grounds*, 77 MISS. L.J. 401, 415 (2007).

²⁹ Thomas Y. Davies, *Correcting Search and Seizure History: Now-Forgotten Common-Law Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 MISS. L.J. 1, 3 (2007).

³⁰ *Id.*

³¹ *Id.* at 4.

odology in *Search and Seizure Cases* to the symposium. In his article, Professor Williams examines the methodologies of state courts and observes that there is “a strikingly wide range of judicial approaches to the interpretation and application of state constitutional search and seizure guarantees.”³² He catalogues those various approaches. Studying those varying approaches, Professor Williams observes, “will contribute to the development of a state’s search and seizure jurisprudence just as surely as will the outcome, reasoning and holdings on the merits of those cases.”³³

Lawrence Friedman, an Associate Professor at the New England School of Law, offers an insightful view of state court responsibilities in interpreting their own constitutions. In his article, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, Professor Friedman observes that many of the decisions departing from federal precedent “can be viewed as reactive, with the state court content to announce disagreement with the Supreme Court’s interpretation of the parallel provision of the Federal Constitution and to hold that the state constitution protects more broadly the individual right or liberty in question.”³⁴ Such decisions, he contends, “typically provide scant explanation for the result beyond a reference to such grand concepts as liberty, equality, or privacy, which the framers of the state constitution held dear.”³⁵ Professor Friedman believes that two distinct “dispiriting effects follow from reactive state constitutional rulings that lack completely theorized rationales.”³⁶ First, “a reactive and incompletely theorized decision is not likely to contribute meaningfully” to the development of search and seizure jurisprudence and, second, they are “likely to fail to supply judges, lawyers, government actors, and citizens with sufficient guidance to settle expectations about the bounds of those constitutional commitments.”³⁷ He therefore challenges

³² Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225, 230 (2007).

³³ *Id.* at 263.

³⁴ Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 266 (2007).

³⁵ *Id.*

³⁶ *Id.* at 268.

³⁷ *Id.*

state courts to develop more “completely theorized justifications” in their opinions, but observes that the “potential for state constitutional individual rights decisions that are more completely theorized depends primarily upon the tenacity and thoughtfulness of the lawyers who argue these matters before state court judges.”³⁸

³⁸ *Id.* at 269.

CORRECTING SEARCH-AND-SEIZURE HISTORY: NOW-FORGOTTEN COMMON-LAW WARRANTLESS ARREST STANDARDS AND THE ORIGINAL UNDERSTANDING OF “DUE PROCESS OF LAW”

*Thomas Y. Davies**

“Real history is not achieved by the subordination of the past to the present, but rather by our making the past our present and attempting to see life with the eyes of another century than our own.”**

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As indicated in the notes, this article extends the author's criticisms of conventional search-and-seizure history in previous articles published in the *Michigan Law Review* and the *Wake Forest Law Review*. Except when noted, passages from historical sources in this article are presented with the historical spelling, capitalization, and punctuation, but in modern typeface and with modern spacing.

** HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 16 (1951).

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INTRODUCTION

The large question in this symposium is whether it is appropriate for state courts to “depart” from the Federal Supreme Court’s construction of search-and-seizure doctrine. Because the Federal Supreme Court has adopted a fairly minimalist view of search-and-seizure protections during recent decades,¹ the practical question is whether it is appropriate for state courts to construe state constitutions to provide stronger state search-and-seizure protections than the federal protections. This article assesses the implications that the history of search-and-seizure doctrine holds for that question.

Some recent Federal Supreme Court opinions have purported to base search-and-seizure decisions on the original or intended meaning of the Fourth Amendment. Because it may appear that those recent assertions are at least broadly consistent with the conventional history of search-and-seizure doctrine, those originalist claims may seem plausible. Hence, because it may seem that history is on the side of the Federal Court’s construction, it may seem that history inclines against the legitimacy of state court “departures” from the federal construction.

I argue that is not the case. As I have on prior occasions, I argue that the current conception of Fourth Amendment “reasonableness” substantially understates the limits that the

¹ For a brief summary of current doctrine and recent developments, see for example, Craig M. Bradley, *The Fourth Amendment: Be Reasonable*, in *THE REHNQUIST LEGACY* 81-105 (Craig Bradley ed., 2006); Thomas Y. Davies, *Fourth Amendment*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 360-64 (2d ed. Kermit L. Hall ed., 2005).

Framers thought they had placed on government searches and seizures. I argue that the conventional history of the Fourth Amendment is itself invalid,² and that the historical claims in recent Supreme Court search-and-seizure rulings usually amount to only fictional originalism.³ Thus, I conclude that the authentic history does not oblige state courts to defer to the Federal Supreme Court's construction of search-and-seizure rights.

I do not deny that a substantial literature on search-and-seizure history has endorsed the notion that the Fourth Amendment was always understood to create a comprehensive reasonableness standard applicable to all forms of government intrusions. However, I argue that the conventional history reflected in this literature is not grounded in fact. Rather, previous commentaries typically have not inquired whether the history announced in modern Supreme Court opinions was actually continuous with the historical meaning so much as they have interpreted the historical sources to comport with the modern Supreme Court's rendition of Fourth Amendment reasonableness.

As a result, the conventional history is both incorrect and incomplete. It is incorrect insofar as it treats the Fourth Amendment and the comparable state warrant provisions as though they were meant to comprehensively assess all government intrusions, including warrantless searches, arrests, and detentions, according to a reasonableness standard. Instead, the Fourth Amendment and its state counterparts were simply intended to control the issuance of warrants.

² See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 557-58 (1999).

³ For some examples of fictional originalist claims regarding search and seizure, see Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 256-66 (2002) [hereinafter, Davies, *Arrest*]. Fictional originalist claims also appear in opinions dealing with other aspects of criminal procedure. See, e.g., Thomas Y. Davies, *Not the Framers' Design: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 BROOK. J. L. & POL. 439 (2007) [hereinafter, Davies, *Hearsay*].

The conventional history is also seriously incomplete insofar as it ignores the degree to which historical common-law arrest standards informed the original understandings of the state “law of the land” and “due process of law” constitutional provisions, as well as the “due process of law” clause in the Federal Fifth Amendment.⁴ Indeed, inattention to framing-era common-law arrest standards has even tended to obscure the primary reason that the Framers were so intensely opposed to the issuance of too-loose warrants: general warrants were “unreasonable” precisely because they bestowed *discretionary* arrest and search authority on ordinary peace officers.

A. The Errors in Conventional Fourth Amendment History

Of course, modern search-and-seizure doctrine treats the Fourth Amendment (and the comparable state warrant provisions) as *the* constitutional locus of search-and-seizure doctrine. Specifically, the Supreme Court has construed the statement of a “right” against “unreasonable searches and seizures” in the first clause of the Fourth Amendment as a free-standing “Reasonableness Clause” that comprehensively requires (only) that all government intrusions into citizens’ privacy be “reasonable.” Indeed, recent Supreme Court opinions sometimes quote only the first clause when construing the Fourth Amendment.⁵

Moreover, the Court has construed Fourth Amendment “reasonableness” to mean that the constitutionality of government intrusions should be assessed by balancing citizens’ interest in privacy against the government’s interest in suppressing crime. Under this balancing regime, warrants are rarely required and, although custodial arrests and full searches still require probable cause (albeit defined rather loosely), lesser intrusions are permitted on even less demanding grounds, depending on the setting and circumstances—even to the point of

⁴ To preserve a clear distinction between historical meanings and current doctrine, I adopt the convention in this article of referring to the former as the “due process of law clause” and reserve the usual “Due Process Clause” for the latter.

⁵ See Davies, *supra* note 2, at 558 n.11.

permitting suspicionless searches when government institutions have special needs.⁶

Conventional search-and-seizure history comports with modern doctrine insofar as it asserts that the first clause of the Fourth Amendment was *always* understood to create a comprehensive reasonableness standard applicable to all types of government intrusions. However, as I have previously documented, the relevant historical sources show that the Fourth Amendment and the comparable state provisions were originally understood simply as bans against too-loose warrants, especially in the form of “general” (that is, unparticularized) warrants. Indeed, most of the state warrant provisions adopted prior to the Fourth Amendment did not contain any mention of “unreasonable searches and seizures” or any other language that could have addressed anything more than warrant standards. Likewise, the drafting of the Fourth Amendment itself is also devoid of any evidence of a comprehensive “reasonableness” standard.⁷

Additionally, post-framing sources do not reveal any notion of a “reasonableness” standard distinct from the probable cause and particularity standards expressly set out for valid warrants in the second clause of the Fourth Amendment. Rather, the notion of a broad “reasonableness” standard does not appear until an 1886 Supreme Court opinion, roughly a century after the framing.⁸ Additionally, the Justices did not construe the Fourth Amendment to reach warrantless searches until 1914,⁹ and did not construe it to reach warrantless arrests until 1959.¹⁰ The modern “reasonableness” construction of the Fourth Amendment is only a modern invention, not a framing-era understanding.

Of course, recognizing that the original Fourth Amendment simply banned too-loose warrants poses what may seem an ob-

⁶ See *infra* notes 39-44 and accompanying text.

⁷ See generally Davies, *supra* note 2. See also Davies, *Arrest*, *supra* note 3, at 389-91.

⁸ *Boyd v. United States*, 116 U.S. 616 (1886), discussed *infra* notes 626-39 and accompanying text.

⁹ *Weeks v. United States*, 232 U.S. 383 (1914), discussed *infra* notes 641-55 and accompanying text.

¹⁰ *Draper v. United States*, 358 U.S. 307 (1959), discussed *infra* notes 677-80 and accompanying text.

vious quandary: why would the Framers have been content to regulate only arrests or searches made under warrants, but ignore *warrantless* arrests and searches? Indeed, why would they have prohibited conferring discretionary authority on officers in the form of too-loose warrants if officers could exercise broad discretion in deciding to make warrantless arrests or searches? Even recognizing that the warrant was a far more important source of arrest and search authority in 1789 than it is today,¹¹ it seems implausible that the Framers would not have erected some constitutional limit on warrantless arrests. Indeed, the implausibility of the Framers having left warrantless intrusions completely unregulated may seem to support the modern reasonableness construction of the historical Fourth Amendment.¹²

However, the historical sources provide an answer to this seeming quandary: namely, the Framers understood that common law provided settled and rigorous warrantless arrest standards and that those standards informed another set of constitutional provisions. However, conventional search-and-seizure history has overlooked those provisions because the framing-era common-law arrest standards were forgotten, or suppressed, during the nineteenth century—before the conventional history of search and seizure was composed.

B. Common-Law Arrest Standards and the “Law of the Land” and “Due Process of Law” Provisions

Specifically, framing-era sources reveal that the common-law standards for warrantless arrest, along with other common-law requisites for initiating valid criminal prosecutions such as the requirement of a valid grand jury indictment for a felony trial, were salient components of the framing-era understanding of the state “law of the land” and “due process of law” provi-

¹¹ See Davies, *supra* note 2, at 627-34 (explaining that the framing-era peace officer had little authority beyond that of a private person except when he executed a judicial warrant).

¹² Cf. *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973) (opinion of the Court by Rehnquist, J.) (stating that “[t]he Framers of the Fourth Amendment have given us only the general standard of ‘unreasonableness’ as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required”).

sions. Those provisions drew upon Sir Edward Coke's then-famous rendition of the "law of the land" chapter of Magna Carta—a rendition in which Coke treated "due process of law" as a near synonym for "the law of the land" and in which he also set out the common-law standards for warrantless arrests as aspects of "process of law."¹³

Moreover, when the initial state constitutions were adopted during the late eighteenth century, the common-law authorities that Americans consulted still set out virtually the same arrest standards that Coke had in the early seventeenth century. Thus, during the framing era, common-law arrest standards were understood to be firmly settled aspects of "the law of the land" and "due process of law." Although it is possible that arrest authority was not as prominent a concern among the Federal Framers in 1789 as it had been among the earlier State Framers, it nevertheless appears likely that the Cokean tradition and common-law arrest standards still informed the "due process of law" guarantee in the Federal Fifth Amendment.

Thus, the conventional history of search-and-seizure doctrine is incomplete insofar as it omits any consideration of the original Cokean understandings of the constitutional provisions that required compliance with "the law of the land" and "due process of law." Indeed, the reason that too-loose warrants were of such special concern as to merit their own specific constitutional provision was precisely that the potential for legislative authorization of such warrants posed a unique threat to the otherwise settled common-law limits on arrests, searches, and seizures.

¹³ 2 SIR EDWARD COKE, THE INSTITUTES OF THE LAWES OF ENGLAND 45-56 (written prior to Coke's death in 1634, published by order of the House of Commons in 1642). For later publication history, see 1 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 546 (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955) [hereinafter MAXWELL]. The four volumes of Coke's *Institutes* are usually referred to by the volume number; thus, the second volume is the "*Second Institute*." The second volume is sometimes called "*Coke on Magna Carta*" in colonial sources. The first volume is usually called "*Coke on Littleton*."

1. Common-Law Arrest Standards and "The Law of the Land"

Of course, a reader who is familiar with the conventional account of search-and-seizure history may react to my thesis with incredulity. A reader who is familiar with the conventional history of due process may have the same reaction. Let me meet that by previewing a telling historical fact: the 1780 Massachusetts Declaration of Rights, drafted by John Adams, was the first provision that prefaced the ban against too-loose warrants with a declaration of a right against "unreasonable searches and seizures"—the textual basis for the modern "reasonableness" construction of the Fourth Amendment. However, an earlier provision in that same Massachusetts Declaration commanded that no one was to be "*arrested, imprisoned,*" or punished except by "*the law of the land.*" Hence, Adams and the Massachusetts Framers had no need to stretch the ban against general warrants to reach warrantless arrests. Rather, the Massachusetts warrant provision simply set standards for the issuance of warrants and used "unreasonable searches and seizures" as a pejorative label for the gross illegality of searches made under general warrants.¹⁴

Moreover, the treatment of arrests and warrants in the Massachusetts Declaration was neither idiosyncratic nor novel. The Massachusetts "law of the land" clause was a fairly direct paraphrase of the then-famous "law of the land" chapter of Magna Carta. In the more traditional phrasing, that chapter banned any person being "taken or imprisoned" except in conformity with "the law of the land"—that is, it banned arrest and pretrial imprisonment except according to the common law that was the Englishman's birthright.¹⁵ Several states that had adopted declarations of rights prior to Massachusetts had used the more traditional term "taken" in phrasing their "law of the land" provisions—and "taken" was a synonym for arrest. Like the Massachusetts Declaration, several other state declarations adopted prior to the Federal Bill of Rights also included *both* a broad "law of the land" guarantee and a focused ban against

¹⁴ See the provisions quoted *infra*, text accompanying notes 356, 360.

¹⁵ See *infra* note 109 and accompanying text.

issuance of "general" or otherwise too-loose warrants. Additionally, several other states adopted a constitutional "law of the land" clause that used "taken" or "arrested" even though they did not adopt any provision that addressed warrant standards themselves.¹⁶

The explanation for the different characters of the two search-and-seizure provisions is apparent. The conventional account of Fourth Amendment history is correct insofar as it treats the ban against too-loose warrants in that Amendment as a response to a series of specific controversies involving general warrants that occurred during the decades leading up to the American Revolution, as well as to a revival of fears of the potential for federal general warrant searches during the ratification debates of 1787-1788. Precisely because those controversies were recent, and the illegality of general warrants only recently settled, the American Framers adopted explicit and detailed bans against the issuance of too-loose warrants.

In contrast, as of 1789 the common-law rules regarding warrantless arrest authority appeared to be so firmly settled as to be permanent. During the seventeenth century, enforcement of common-law limits on arrests and pretrial imprisonment had been a salient feature of the Whig struggle to contain the prerogative power of the English crown. The issue had not involved any controversy over the content of the common-law arrest standards, but only whether the crown was obliged to abide by those standards. In the course of that struggle, Coke and other Whigs had invoked the "law of the land" chapter of Magna Carta as authority for the illegality of arrests that did not comport with legal standards. Thus, when the Whigs triumphed in the Glorious Revolution of 1688, that triumph removed any question as to whether arrests had to conform to the already settled common-law standards.¹⁷

¹⁶ Discussed *infra* notes 313-96 and accompanying text.

¹⁷ My use of the term "Whig" in referring to Coke and his contemporaries is temporally incorrect insofar as that term did not come into use until the late seventeenth century. Nevertheless, because the later Whigs regarded themselves as a continuation of the earlier resistance to the crown, it is a useful and convenient label for the earlier opponents of the royal prerogative.

Because common-law arrest standards appeared fixed and noncontroversial throughout the eighteenth century—indeed, there had been virtually no change since Coke’s writings from the early seventeenth century—the American Framers saw no need to set them out in any detail. Instead, they simply invoked the settled common-law arrest standards by using the Whig rhetorical label of “the law of the land” or its near synonym “due process of law” and assumed that terminology would suffice to constitutionalize the common-law standards for initiating criminal prosecutions, including arrest and indictment standards.

Thus, the state declarations of rights and the Federal Bill of Rights set out constitutional limits on what we now call “search-and-seizure” authority *in two provisions* rather than one. The general search-and-seizure provision, which regulated warrantless arrests as well as other requisites for initiating criminal prosecutions, was stated in the traditional invocative language of “the law of the land” or “due process of law,” while the ban against general warrants was stated separately, explicitly, and in detail.

2. The Post-Framing Loss of the Common-Law Arrest Standards

The reason the authentic story of search-and-seizure history is now obscure is that the constitutionalization of pretrial common-law standards failed. The Cokean content of “the law of the land” and “due process of law” was lost and disappeared during the nineteenth century when judges and commentators either forgot or deliberately jettisoned the settled warrantless arrest standards that were implicit in those terms. Instead, judges and commentators began to describe “due process” as though it referred only to criminal trial rights or to the protection of property interests. Indeed, during the late nineteenth century, the Federal Supreme Court essentially erased the original criminal procedure content of “due process of law” when it construed the Due Process Clause of the Fourteenth Amendment to exclude all but the most “fundamental” criminal proce-

dures standards—not including arrest standards or indictment.¹⁸ As a result, by the late nineteenth century there no longer was any constitutional standard for warrantless arrests.

The deconstitutionalization of arrest standards during the nineteenth century was an important development in the evolution of American criminal procedure. It appears that the political elite lost their fear of government oppression but became increasingly fearful of property crime, and that state court judges responded to that shift by relaxing the rigorous warrantless arrest standards that had been a salient feature of common-law accusatory procedure. In particular, although common law had severely restricted warrantless misdemeanor arrests and had permitted warrantless arrests for felonies only when a felony had actually been committed, nineteenth-century state judges began to permit police officers, but not private persons, to make warrantless arrests simply on “probable cause” that a crime might have been committed. Additionally, although common law had limited warrantless arrest authority to complainants who personally had knowledge of committed felonies, state judges appear to have construed the probable cause standard to allow officers to act on the basis of hearsay information from informants.

This relaxed standard for warrantless arrests increased lawful opportunities for government investigation of crime to such a degree that it was the doctrinal catalyst for a transformation of criminal procedure. The adoption of the probable cause warrantless arrest standard facilitated the invention of the modern police officer, and led to the emergence of modern investigatory procedure. Indeed, warrantless arrests under the relaxed standards became the dominant form of arrest—so much so that the badge of the new police officer began to carry the sort of discretionary arrest and search authority that general warrants had conferred in the eighteenth century. As a consequence, the warrant standards set out in the Fourth Amendment and in the state warrant provisions became largely irrelevant to real-world criminal procedure.

¹⁸ See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884), discussed *infra* notes 613-22 and accompanying text.

3. The Supreme Court's Reinvention of Search-and-Seizure Doctrine

The modern Supreme Court eventually responded to the new regime of discretionary policing by reinventing search-and-seizure doctrine under the umbrella of the Fourth Amendment. During the twentieth century, the Justices extended the scope of the Fourth Amendment to reach warrantless searches and later extended it even to warrantless arrests—but the Justices did not revive the rigorous common-law arrest standards. Rather, they addressed arrest in terms of the Fourth Amendment's probable cause and reasonableness standards. As a result, the creation of modern search-and-seizure doctrine only partly offset the earlier expansion of government law enforcement powers. Additionally, the formulation of Fourth Amendment "reasonableness" proved to be two-edged. During the first half of the twentieth century, the Justices sometimes employed that formulation to expand protections of citizens' security and privacy. More recently, however, the Justices have employed that formulation to further expand government investigatory powers.

The bottom line is that search-and-seizure history did not follow the steady path that the Framers expected. In contrast to the conventional account of doctrinal continuity, the authentic history of search-and-seizure doctrine is a story of lost meanings and substantial discontinuity. Indeed, the authentic history is a story of considerable irony: it appears that the Framers were content to simply invoke common-law arrest standards under the rubrics of "the law of the land" and "due process of law" because those standards seemed so settled that there was no reason to set them out explicitly. However, when later generations became increasingly ignorant of the common-law standards, the invocative character of the Framers' texts ultimately left once-settled arrest standards vulnerable to change and loss.

C. Recovering Authentic Constitutional History

This article undertakes to correct the conventional history of search-and-seizure doctrine by explicating the historical common-law warrantless arrest standards and documenting the

relationship of those standards to the “law of the land” and “due process of law” provisions. It also begins to trace out how those rigorous common-law arrest standards and the original understanding of the “law of the land” and “due process of law” provisions were lost during the nineteenth century, and the implications of that loss for the evolution—or more accurately, transformation—of pretrial criminal procedure. However, because of the complexity of the developments by which the original meanings of “the law of the land” and “due process of law” were lost, I only sketch out some of the more prominent features of the latter part of the story.

The historical analysis in this article is shaped by a crucial methodological premise: that authentic legal history can be recovered only by closely examining what the constitutional texts and relevant historical sources actually reveal, rather than by making assumptions, derived from modern doctrine, as to what “must have” been meant. My previous research in criminal procedure history has taught me that the past really is a foreign country—so much so that one cannot reach it if one starts out with the expectation that historical doctrine must somehow connect with and conform to modern doctrine.¹⁹ I have also learned not to rely upon historical claims that appear in judicial opinions. Judges are deciders, not historians; they shape history to support their decisions at least as much as they base decisions on history.²⁰

¹⁹ In chronological order, my previous articles on historical criminal procedure include: Davies, *supra* note 2 [1999] (discussing the original understanding of the Fourth Amendment); Davies, *Arrest*, *supra* note 3 [2001] (discussing framing-era arrest law); Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial” Right in Chavez v. Martinez*, 70 TENN. L. REV. 987 (2003) [hereinafter, Davies, *Fifth Amendment*] (discussing the original understanding of the right against compelled self-accusation); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005) (discussing the original understanding of the Sixth Amendment Confrontation Clause) [hereinafter Davies, *Crawford*]; Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”: A Reply to Mr. Kry*, 72 BROOK. L. REV. 557 (2007) [hereinafter, Davies, *Cross-Examination Rule*]; Davies, *Hearsay*, *supra* note 3 [2007] (discussing framing-era hearsay doctrine).

²⁰ Professor Reid has summed up judicial use of history nicely:

Today a judge writing a decision in, let us suppose, a native American land case, does not say to his law clerk, “What rule does history support?” Rather,

That said, I call the reader's attention to substantial differences in the quality and quantity of evidence that pertain to the larger points that I argue in this article. I think the reader will find that there is substantial and fairly direct evidence that the State and Federal Framers addressed only warrant standards, but not warrantless intrusions, in the Fourth Amendment and the comparable state warrant provisions. Likewise, it is plain that the Cokean tradition treated common-law arrest standards as components of the "law of the land" chapter of Magna Carta, and there is also substantial and fairly direct evidence that the State and Federal Framers required compliance with the legal standards for arrest, including warrantless arrest, in the "law of the land" and "due process of law" constitutional provisions.

However, at least as things currently stand, there are maddeningly few surviving statements that directly illuminate the precise content that the Framers assigned to the clauses requiring compliance with the "law of the land" and "due process of law." Viewed analytically, and from a modern perspective, there are two possibilities. One, which might be labeled the weak construction, is that those provisions simply required that legal process and proceedings comport with then-prevailing legal standards, but did not undertake to fix the standards themselves. Under that view, "due process of law" would not limit legislative authority to alter criminal procedure standards. A majority of the Justices of the Supreme Court endorsed that

the judge tells her, "We're going to adopt such-and-such rule. Find me some history to support it." It will not matter to the judge or his colleagues on the court the quality of the historical evidence that she finds.

John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, in *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* 228 (Ellis Sandoz ed. 1993). As Reid suggests, judges are in the business of making and justifying decisions, not of searching out and recovering historical modes of thought. Because continuity is a basic source of legal justification, judges tend to characterize their rulings as though they are continuous with historical doctrine—even when the rulings are novel and the invocation of history distorts earlier doctrine. In particular, the purportedly "originalist" claims in modern Supreme Court search-and-seizure opinions have often diverged from the authentic history. Thus, the only way to get the history right is to focus on the historical evidence while setting aside the modern claims. See, e.g., Davies, *Arrest*, *supra* note 3, at 418-21; Davies, *Cross-Examination Rule*, *supra* note 19, at 633-37.

view in 1884 in *Hurtado v. California*,²¹ and that would appear to be the current interpretation as well.

The other view, which might be labeled the strong construction, is that the Framers understood that the “law of the land” and “due process of law” provisions actually constitutionalized the salient common-law rules and standards in effect at the time of the framing. Under that view, “due process of law” referred to the common-law forms of legal process and proceedings that were in use in America at the time of the framing, and the constitutional provisions prohibited legislative relaxation of those standards. The Supreme Court earlier endorsed that strong construction of “due process” in the 1855 ruling in *Murray’s Lessee v. Hoboken Land & Improvement Co.*,²² and

²¹ 110 U.S. 516, 528-38 (1884), discussed *infra* notes 613-22 and accompanying text.

²² 59 U.S. (18 How.) 272, 275-80 (1855). The case involved the constitutionality of an 1820 statute that authorized the use of a “distress warrant” proceeding to collect revenue that a federal revenue collector owed the federal government. The Justices unanimously rejected a claim that that proceeding violated the due process of law clause of the Fifth Amendment. Writing for the Court, Justice Curtis stated that the distress warrant constituted a form of legal process and stated the following regarding “due process of law”:

The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process ‘due process of law,’ by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, *we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.*

Id. at 276-77 (emphasis added). Thereafter, Justice Curtis’s opinion found that the distress warrant was well established in English law. *Id.* at 277-78. Additionally, he found that distress warrant statutes were enacted in a number of American states during or shortly after the framing era, and also in earlier federal statutes. *Id.* at 278-80. Thus, he concluded that, because it met the test of being a form of process in use when the due process of law clause was framed, the distress warrant satisfied the requirements of “due process of law” in the Fifth Amendment. *Id.* at 280. The Justices continued to interpret due process according to historical English procedure in use at the time of the framing of the Bill of Rights in *Davidson v. City of New Orleans*, 96 U.S. 97, 101-02 (1877), and *Munn v. Illinois*, 94 U.S. 113, 123-25 (1876). Professor Mott identified a

Justice Harlan still did so in his dissenting opinion in *Hurtado*.²³

Although there seems to be relatively little specific historical evidence on this issue, I think there are persuasive reasons to think it highly probable that the American Framers held the strong view of “due process of law” and would have understood that the “law of the land” and “due process of law” provisions incorporated common-law warrantless arrest standards. Most basically, Coke explicitly construed the “law of the land” chapter of Magna Carta—a document of constitutional stature—to incorporate the common-law standards for warrantless arrest, and there is no doubt that the Framers were familiar with and attached importance to Coke’s writings.²⁴ Additionally, arrest law was still a matter of common law rather than statute law during the framing era—so much so that to speak of the “law” of arrest during the framing era was to speak of the settled common-law standards.²⁵ Moreover, on those occasions when proponents of a federal bill of rights did discuss the larger purpose of such a declaration, they tended to refer to that project in terms of protecting “common-law securities” or rights.²⁶

Along the same lines, there is significant evidence that the criminal procedure provisions in the state declarations of rights were intended to limit the otherwise plenary powers of the state legislatures, and there is clear evidence that the criminal procedure provisions in the Federal Bill of Rights were aimed at limiting the power of Congress.²⁷ That goal would not have been well served unless the “law of the land” and “due process of law” guarantees were understood to place settled criminal procedure

number of earlier state cases that advanced a similar view of due process of law as that advanced by the Federal Supreme Court in *Murray*. See MOTT, *infra* note 91, at 241-42.

²³ 110 U.S. at 538-58, discussed *infra* notes 613-22 and accompanying text.

²⁴ See *infra* notes 103, 123-26, 249-58 and accompanying text.

²⁵ See 3 William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1514 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (three volumes) (on file with the author) (noting that arrest authority was not defined by statutes in America prior to 1791); Davies, *Arrest*, *supra* note 3, at 327-33 (discussing the marginal significance of early English and early colonial arrest statutes); *id.* at 344-54 (discussing framing-era state statutes); *id.* at 355-56 (discussing the absence of federal statutory authority for warrantless arrests until 1935).

²⁶ See *infra* notes 263-64, 412 and accompanying text.

²⁷ See *infra* notes 447-54 and accompanying text.

standards such as common-law arrest standards beyond legislative revision. Hence, that goal also implies incorporation of common-law arrest standards.

Indeed, it seems likely that the scarcity of surviving statements by the Framers regarding the incorporation of common-law criminal procedure standards simply reflects the degree to which the Framers' generation thought that the incorporation of common-law standards was so obvious that it need not be stated. Authors and drafters typically do not expend words on points that seem unquestionable. As a result, all texts are incompletely explicit insofar as they omit to state premises that are taken for granted. This is especially the case when the author or drafter is trying to be as concise as possible, which seems to have been the traditional approach to drafting constitutional provisions. Hence, one cannot reach a historically authentic understanding of a constitutional provision simply by parsing its words with the aid of a historical dictionary. Rather the text has to be understood to include the shared expectations of the time.

The crucial fact about the early state declarations and the Federal Bill of Rights is that they were framed in the era of common law. The principles and rules of common law were generally regarded as settled and permanent.²⁸ Legislation was still limited in scope and statutes were generally understood to be either declaratory of existing common law or remedial of specific gaps or defects in common law; certainly there was no expectation that legislation would supplant or replace common law.²⁹ Thus, the criminal procedure provisions in the Federal Bill of Rights and the earlier state declarations implicitly incorporated a shared expectation that then-settled common law procedural standards would persist. As a result, the American declarations of rights were not framed to be comprehensive catalogs of procedural rights. Rather, they explicitly addressed those aspects of common-law rights that had been contested in

²⁸ See, e.g., WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 18-19 (1994 ed.).

²⁹ See *id.* at 13-14, 90-91.

the recent or distant past, but they left uncontested aspects of those rights largely or entirely implicit.³⁰

One prominent silence of this sort is familiar to any student of search-and-seizure doctrine—the absence of any statement in the Fourth Amendment or any of its state predecessors as to whether or when warrants were required to justify a search or arrest. Those provisions obviously reflected an assumption that warrants were important—why else specify the minimum standards for their issuance? Moreover, framing-era common-law authorities reveal that there were well-settled understandings that misdemeanor arrests generally required a warrant and that only a valid felony warrant could justify an intrusion into a house. Indeed, the only contested issue during the famous general warrant controversies that arose prior to the framing was whether an unparticularized warrant could be valid—it does not appear that anyone questioned the common-law rule that a warrant was needed to justify a house search.³¹

Thus, the fact that the constitutional provisions regarding warrants do not say when warrants need be used does not mean that the Framers had no expectation on that subject. Rather, the warrant requirement went unstated because it was such a well-settled and noncontroversial element of common law that it did not occur to the Framers that there was any need to state it.³² Hence, because the Framers composed the constitutional texts around a pervasive assumption that common-law rules would persist, they confined their explicit formulations to those points that then seemed potentially problematic—not to the

³⁰ Professor Reid has made a similar point regarding what was and was not discussed during the prerevolutionary debates, noting that “[m]ost of what colonial whigs said about rights had to do with the basis for the authority of rights, rather than their definition. The rights were British rights *and well known*. Why Americans were entitled to them was more controversial and more complicated.” See JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 65 (1986) (emphasis added).

³¹ See *infra* notes 47-57 and accompanying text.

³² Some commentaries have claimed that the Framers were actually hostile to the use of specific warrants as well as general warrants. In particular, Professors Telford Taylor and Akhil Amar have advanced such claims. However, those claims were devoid of valid evidence, and ignored clear evidence to the contrary. See Davies, *supra* note 2, at 571-90.

points that seemed settled.³³ Indeed, James Madison described the contents of the Bill of Rights as those essential rights “thought to be in danger.”³⁴

Hence, what now seem like odd silences or gaps in a constitutional text may merely indicate that the Framers were not troubled by issues that trouble us because, from their perspective, those matters were already controlled by settled and non-controversial doctrines. We now find these points problematic only because we no longer draw upon the settled common-law standards that informed the Framers’ understanding. Thus, when state or federal “law of the land” or “due process of law” provisions required compliance with legal standards when a person was “taken” or “arrested,” it appears to be highly probable that framing-era Americans would have understood those provisions to implicitly constitutionalize settled common-law arrest standards.

I discuss this point at the outset because I want to make it clear that I take a different approach to assessing original meaning in this article than that which often appears in Supreme Court opinions or commentaries. I do not think that one can reach an authentic understanding of the meaning a provision held at the time of the framing simply by parsing the words of the text because that approach ignores the shared, implicit assumptions that informed the public meaning that text carried at the time it was framed. Rather, authentic original meaning can be recovered only by construing the text in the context of the underlying but unstated common-law principles. I concede that an assessment of the Framers’ unstated premises is inescapably dependent upon a broader assessment of the Framers’ attitudes toward common-law procedure. Nevertheless, the

³³ Another similar silence is evident in treatments of bail: American constitutional provisions routinely prohibited “excessive” bail but, with only one exception, did not state a right to the availability of bail in non-capital cases—even though the common-law authorities set out a settled understanding of that availability. *See infra* notes 296-302 and accompanying text. A similar silence is evident in some provisions that asserted the principles of habeas corpus but that did not otherwise refer to standards for arrest; because habeas corpus would serve no purpose in the absence of settled arrest standards, it would appear that such provisions rested on an implicit expectation of settled arrest standards. *See infra* note 406.

³⁴ *See infra* note 444 and accompanying text.

original meaning cannot be recovered without making that assessment.³⁵

D. The Organization of this Article

Part I begins with a brief summary of the conventional account of search-and-seizure history as Fourth Amendment history. Because I have criticized the conventional history in earlier articles, I simply review the highlights of that criticism in this article.

Part II discusses the inclusion of common-law arrest standards in the Cokean conception of “the law of the land” and “due process of law.” I begin by discussing the prominence of Coke’s interpretation of the “law of the land” chapter of Magna Carta and then describe the rather precise meaning Coke assigned to “due process of law” in that chapter. In particular, I note that Coke’s discussion of “due process of law” included: the standards for arrests and, especially, warrantless arrests; the need for a

³⁵ This is a large topic that cannot be treated in detail here. Prominent examples of American claims to common-law rights would include Patrick Henry’s resolves, adopted by the Virginia colonial legislature in May 1765, which asserted that the American colonists were entitled to “all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed, by the people of Great Britain” as if “they had been abiding and born within the Realm of *England*.” See REID, *supra* note 30, at 18-19. Likewise, the Declaration of Rights promulgated by the Continental Congress in 1774, which Professor Reid describes as “the most comprehensive statement of colonial privileges made during the revolutionary period,” included among the nine significant rights asserted the right to “the common law of England,” and also asserted the right to “such of the English statutes, as existed at the time of colonization.” *Id.* at 19-20. (Note that the latter would have included Magna Carta and the various parliamentary confirmations of Magna Carta.) Reid also has commented that “the right to common law, a right claimed by all the colonies,” was “a general right, guarding other rights,” and that

In its more narrow aspect, the right [to common law] was a claim to the doctrines and forms of common law, both public and private. At its broadest, it embraced more than rule by British constitutional law and blended into the notion of rule by law, for the right claimed the protection of law binding not only on the judiciary but also on the sovereign, and was superior in form, content, and substance to legislative promulgations. In eighteenth-century legal theory, there could be no absolute rights of persons if Parliament was constitutionally empowered to promulgate absolute law. It was that issue—whether parliamentary supremacy meant parliamentary sovereignty—that made the right to common law a central part of the American whig constitutional case.

Id. at 23.

warrant to justify “breaking” a house to make an arrest; the requirement of a valid indictment as a prerequisite of a felony trial; and the enforcement of those standards through the remedy of the writ of habeas corpus.

To show the continuity of the Cokean understanding of warrantless arrest standards, I also briefly set out and compare the common-law arrest and search standards that appear in framing-era authorities—that is, the standards that the State and Federal Framers thought they were preserving when they adopted the “law of the land” and “due process of law” provisions—and explain how those accusatory standards, which included a requirement of proof that a crime had actually been committed, were more stringent than modern “probable cause” doctrine.³⁶ I then complete this discussion by noting that, during the framing era, the term “due process of law” was used infrequently and still usually connoted *pretrial criminal procedure*.

Part III examines the framing of the state declarations of rights that were adopted prior to the Federal Bill of Rights. I note that those declarations were understood to place limits on the powers of the state legislature, and document that the initial state declarations typically included two search-and-seizure provisions: (1) a general provision that paraphrased the “law of the land” guarantee of Magna Carta and usually referred to a person’s being “taken” or “arrested”; and (2) a much more focused and detailed ban against general warrants. I also explain that the Hamiltonian faction in the New York legislature substituted “due process of law” in place of “the law of the land” in the 1787 New York Declaration of Rights in order to make it clearer that the legislature could not abrogate that protection.

Additionally, I discuss the state warrant provisions in this part and reiterate evidence that those provisions were focused on banning too-loose warrants, but did not address warrantless intrusions.

³⁶ In particular, I note that both warrantless arrests and criminal search warrants required that a person with direct knowledge make a sworn charge that a crime had been committed “in fact,” and that the accuser had strong grounds to believe that the accused person had committed the crime—in other words, a more rigorous standard than modern “probable cause.” See *infra* notes 149-54, 221-27 and accompanying text.

Part IV moves on to the framing of the Federal Bill of Rights. I note that when state ratification conventions proposed provisions for a federal bill of rights, they typically included the same two-provision treatment of search and seizure as had been used in the earlier state declarations. Similarly, James Madison appears to have followed that model when he made the initial proposals for a federal bill. Thus, the Fifth Amendment (which Madison placed ahead of the Fourth Amendment) addressed *the legal requisites for initiating a criminal prosecution*, including the requirements of lawful arrest and indictment connoted by “due process of law,” while the Fourth Amendment specifically set out the requisites for issuing valid warrants and thereby banned use of general warrants.

Because there is clear evidence that the Federal Bill was drafted primarily to impose limits on the power of Congress, I argue that it makes sense that the Federal Framers would have intended for “due process of law” to incorporate common-law arrest and indictment standards. However, I note that Madison chose an unusually brief paraphrase of Magna Carta for the Fifth Amendment due process of law clause which did not call attention to arrests as directly as the earlier state law of the land provisions had insofar as it did not include either the term “arrested” or “taken,” but rather simply referred to deprivation of “life, liberty, or property.”³⁷

I conclude this part by briefly reviewing the framing of the Fourth Amendment. I call attention to the novelty of the “probable cause” standard for warrants and argue that the Fourth Amendment was aimed primarily at controlling customs

³⁷ I also note that a last-minute reordering of the proposed amendments in the House of Representatives may have also made the arrest content of “due process of law” less apparent. As proposed by Madison and debated in the House, the Fifth Amendment was the first of the criminal procedure amendments, followed by the Eighth Amendment (which prohibited excess bail), and then the Fourth Amendment and Sixth Amendment (which dealt with trial rights). In that order, the Fifth Amendment clearly dealt with the initiation of a criminal proceeding, while the Fourth Amendment had the appearance of being a distinct, focused treatment of warrant standards. In contrast, in the final ordering—which was made by a committee without debate or explanation—the Fourth Amendment appears as first of the criminal procedure provisions (perhaps because, if a warrant were used in a criminal prosecution, it would be used at the outset). Thus, the final ordering makes it less apparent that warrantless arrests were addressed in the Fifth Amendment. See *infra* notes 530-36 and accompanying text.

searches but was not intended to be a comprehensive regulation of search and seizure and was not intended to create any broad reasonableness standard.

Part V provides an overview of the post-framing changes that occurred in search-and-seizure doctrine. The initial change was that, for a variety of reasons, state courts and commentators either forgot or rejected the Cokean content of "the law of the land" and "due process of law," with the result that warrantless arrest standards were effectively deconstitutionalized. At the same time, the state courts responded to increasing fears of crime and disorder by relaxing the earlier common-law warrantless arrest standards and treating "probable cause" of a crime as a sufficient justification for a warrantless felony arrest by a peace officer. That relaxed warrantless arrest standard, which seems to have been understood to allow the officer to act on hearsay information regarding crime, had the effect of conferring what amounted to discretionary arrest authority on the new police officer. That change also marginalized the use of arrest and search warrants and opened the way for the emergence of modern policing and the invention of modern investigatory criminal procedure.

Although the relaxation of arrest standards was primarily the work of the state courts, the Federal Supreme Court also facilitated the transformation of pretrial criminal procedure insofar as the Justices evaded review of state criminal proceedings under the Fourteenth Amendment Due Process Clause by jettisoning the criminal procedure standards that "due process of law" had earlier connoted. Hence, when the Supreme Court later reinvented search-and-seizure doctrine to respond to the discretionary authority of the new law enforcement officer during the early twentieth century, it treated the Fourth Amendment as though it were the only relevant constitutional provision. The Justices then created the "reasonableness" construction of that Amendment and also extended its reach to the regulation of warrantless searches as well as warrants, and—somewhat later—even to the regulation of warrantless arrests and detentions. Notably, the conventional history of search and seizure was formulated after the Supreme Court had invented the central tenets of modern Fourth Amendment doctrine; per-

haps for that reason, the conventional account formulated the history to comport with the doctrine that had already been announced.

Finally, I conclude in Part VI by discussing several lessons and implications that I think the authentic history of search-and-seizure doctrine suggests. One regards the infeasibility of originalism: the authentic history reveals the essential foreignness of our legal past, and that foreignness demonstrates that the “originalist” project evident in recent Supreme Court opinions is inherently misguided. Additionally, because modern federal search-and-seizure doctrine does not have genuine roots in original meaning but, instead, substantially understates the search-and-seizure protections the Framers expected, I suggest that the authentic history should not inhibit a state supreme court from exercising its own judgment regarding the search-and-seizure protections its citizens should enjoy under the state constitution.

I. THE ERRORS IN CONVENTIONAL SEARCH-AND-SEIZURE HISTORY

The first step toward a more authentic history of search-and-seizure doctrine is identifying and clearing away the errors in the conventional account. Those errors are best understood against the backdrop of current Fourth Amendment doctrine.

A. Contemporary Fourth Amendment Doctrine

In contemporary doctrine, the Fourth Amendment is construed as the comprehensive search-and-seizure provision. It reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.³⁸

³⁸ U.S. CONST. amend. IV.

The second clause in this text—now typically called the “Warrant Clause”—explicitly sets the standards for search warrants or arrest warrants. The first clause—now often called the “Reasonableness Clause”—is construed to require that all government intrusions into a person’s privacy not be “unreasonable.” The puzzle of relating the first clause to the second, and particularly as to whether the first clause requires use of warrants that conform to the second clause, has provoked considerable controversy and commentary.³⁹

The overarching reasonableness requirement that is derived from the first clause is usually understood to create a sliding-scale in which the degree of justification required shifts according to the intrusiveness of the government action.⁴⁰ Thus the “probable cause” standard for warrants is regarded as the most stringent justification required for government searches or arrests (although probable cause is now interpreted to merely require that available information indicates a “substantial chance” of criminal activity),⁴¹ and that standard is usually also applied to warrantless searches and custodial arrests.⁴² However, less intrusive law enforcement “detentions” or “frisks” are assessed in terms of an even less demanding “reasonable suspicion” standard.⁴³ Additionally, the reasonableness standard is understood to apply to and regulate a wide range of non-law enforcement government searches or inspections by balancing the government and personal interests involved; thus, in cases involving “special needs” of government institutions or programs, intrusions may not need to be based on individualized suspicion at all.⁴⁴

³⁹ See, e.g., 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 52-53, 167-75 (4th ed. 2006). For other commentaries that discuss the relationship of the two clauses, see Davies, *supra* note 2, at 557 n.9, 569 n.38.

⁴⁰ See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979).

⁴¹ See *Illinois v. Gates*, 462 U.S. 213, 238, 246 (1983) (discussed in Davies, *Arrest*, *supra* note 3, at 379-82).

⁴² See, e.g., *United States v. Watson*, 423 U.S. 411 (1976).

⁴³ See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968).

⁴⁴ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

B. The Conventional History

The most significant feature of conventional search-and-seizure history is that it treats the modern construction of the Fourth Amendment as though it were the original understanding. In particular, the conventional history claims that the Fourth Amendment was *always* understood to be a comprehensive search-and-seizure provision and *always* understood to articulate a broad “reasonableness” standard.

The conventional account of search-and-seizure history derives from a 1937 monograph by Nelson B. Lasson.⁴⁵ Lasson’s account of Fourth Amendment history made two major assertions: (1) the Fourth Amendment and earlier state warrant provisions were prompted by a series of specific historical controversies over the legality of general search warrants, but (2) the Fourth Amendment was expanded beyond the general warrant controversies themselves so as to require that all government searches satisfy a “reasonableness” standard. A number of later works have expanded upon and embellished Lasson’s formulation of these two propositions.⁴⁶

⁴⁵ NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION*, (1937). Lasson’s monograph was developed from his Ph.D. dissertation, Nelson B. Lisansky, *The History and Development of the Fourth Amendment* (1934) (unpublished Ph.D. dissertation, Johns Hopkins University) (on file with the University). See also 1 Cuddihy, *supra* note 25, at xlvii, xc-xci.

⁴⁶ In chronological order, other principal works on search-and-seizure history include: JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* (1966); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 19-46* (1969); Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States* (pts. 1 & 2), 3 U. RICH. L. REV. 278 (1969), 4 U. RICH. L. REV. 60 (1969); POLYVIOS G. POLYVIU, *SEARCH & SEIZURE: CONSTITUTIONAL AND COMMON LAW 1-19* (1982); William J. Cuddihy & B. Carmon Hardy, *A Man’s House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY QUARTERLY 371 (1980); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 571-79 (1983); Cuddihy, *supra* note 25; James Etienne Viator, *The Fourth Amendment in the Nineteenth Century*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* (Eugene W. Hickock, Jr. ed., 1991); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter, “Amar, *Fourth*”] (reprinted in AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 1-45 (1997)); William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997); George C.

The most significant fact about the conventional history is that it was formulated *after* the Supreme Court had already formulated the basic tenets of modern Fourth Amendment doctrine. Thus, the conventional account of search-and-seizure history has focused only on the Fourth Amendment itself. Part of that conventional history is essentially correct; the Fourth Amendment and the earlier state provisions were responses to several prerevolutionary controversies over “general warrants.” However, the notion that the historical Fourth Amendment was intended to create a general reasonableness standard that would apply to more than warrants is entirely a modern fiction. Let me begin with what the conventional history more or less got right.

C. The General Warrant Controversies

Warrants were an extremely important source of law enforcement authority in framing-era law. Constables, the primary peace officers of that period, did not possess the sort of discretionary *ex officio* arrest authority that modern police officers exercise. Rather, the constable acted with the full authority (and protection) of the law only when he acted pursuant to a judicial warrant.⁴⁷ Moreover, because there was a strong notion that judges rather than ordinary officers should decide whether searches or arrests were justified by the evidence and circumstances, common law endorsed only “special” or specific warrants by which the issuing magistrate identified who was to be arrested, or what place was to be searched.⁴⁸ Thus, eighteenth-century common-law authorities deemed “general” warrants to

Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451 (2005); OTIS H. STEPHENS & RICHARD A. GLENN, *UNREASONABLE SEARCHES AND SEIZURES: RIGHTS AND LIBERTIES UNDER LAW* 19-63 (2006). Of course, many additional works discuss the history to varying degrees, especially with regard to the debate over whether the Fourth Amendment includes a warrant requirement. See the sources cited in Davies, *supra* note 2, at 557 n.9.

¹⁷ See Davies, *supra* note 2, at 627-34.

¹⁸ See *id.* at 650-54.

be illegal precisely because they effectively conferred discretionary search or arrest authority on an ordinary officer.⁴⁹

Nevertheless, there were three episodes of controversy regarding the legality of general warrants during the late colonial period. Significantly, these episodes did not involve any controversy over the need for a warrant to justify a search of a house—no one argued that officers could lawfully search houses without warrants. Rather, the controversies extended only to the legality of unparticularized warrants which were not based on a sworn showing of individualized cause to search a house.

The earliest of these controversies, the 1761 *Writ of Assistance Case*, arose in Boston when customs officers began to use a form of general warrant called a “writ of assistance” to authorize customs searches of houses and other buildings.⁵⁰ James Otis, representing Boston merchants, argued that such writs were illegal because they contravened the common-law “Privilege of the house” by conferring discretionary search authority on customs officers. Indeed, Otis quoted Sir Edward Coke’s ruling in *Dr. Bonham’s Case*⁵¹ in arguing that if a statute authorized such general writs, it would be “against common right and reason” and void. However, Otis’s argument was unsuccessful, and the colonial court upheld use of the writ of assistance and issued such writs to customs officers in that colony (although popular hostility seems to have inhibited their actual use).⁵²

A few years after the Boston case, the English central courts in London decided a series of high-visibility trespass

⁴⁹ The leading common law authorities condemned general warrants as illegal by the early eighteenth century. *Id.* at 576-90, 655-59. The only issue during the general writ controversies discussed immediately below was whether Parliament (that is, legislation) could authorize general warrants that were illegal at common law. *Id.* at 657-60.

⁵⁰ See *Petition of Lechmere*, in 2 LEGAL PAPERS OF JOHN ADAMS 125-26 (L. Kinvin Wroth & Hiller B. Zobel eds. 1965) (reprinting John Adams’s notes of James Otis’s argument during the 1761 *Writs of Assistance Case*); see also M. H. SMITH, THE WRITS OF ASSISTANCE CASE (1978). Customs officers in Boston apparently did undertake to search warehouses without warrants prior to 1760. However, when it was objected that a warrant was required, they began to use writs of assistance. It does not appear that there was any attempt to justify warrantless customs searches; rather, the arguments in the 1761 *Writs of Assistance Case* were solely directed to whether general warrants could provide a legal justification for searches.

⁵¹ 8 Coke Rep. 113b, 77 Eng. Rep. 646 (C.P. 1610).

⁵² See Davies, *supra* note 2, at 561, 689-91 (discussing the 1761 *Writs of Assistance Case*).

cases involving general search warrants. Lord Halifax, the English Secretary of State, had issued search warrants that commanded government messengers to find and seize papers regarding a purported publication of a seditious libel, and to arrest any person in whose custody libelous papers were found. These warrants either did not specify what houses were to be searched or what papers were to be seized. In executing these warrants, the messengers searched the house of John Wilkes, an opposition politician, seized his papers, and arrested him. They did likewise with several of his associates. Afterwards, Wilkes and other victims of the general warrant searches brought trespass cases against the messengers and even against Halifax on the ground that the unparticularized warrants were illegal. The messengers attempted to defend the searches as having been authorized by the warrants, but the English judges, especially Lord Camden, ruled that the searches were illegal because general warrants violated fundamental legal principles. Shortly after these rulings, Parliament also expressed its disapproval of general warrants—but reserved unto itself the power to authorize such warrants.⁵³

A few years later, the third and most important round of controversy broke out in America when—notwithstanding the condemnation of general warrants by the English courts—Parliament reauthorized use of general writs of assistance for customs searches in the American colonies in the Townshend Duties Act of 1767. Except in Massachusetts, where the 1761 case was a precedent for the validity of general writs, controversies occurred throughout the colonies when customs officers asked the general court in the colony to issue such writs. The colonial courts typically either did not act on those requests or actually refused to issue such warrants because they could be used “discretionally.” Some colonial courts declared that general writs were illegal or even “unconstitutional.” As a result, general writs were not issued in most of the colonies.⁵⁴

Nevertheless, Americans regarded Parliament’s authorization of general writs as further evidence that Parliament was

⁵³ See *id.* at 562-65, 657-58 (discussing the Wilkesite general warrant cases).

⁵⁴ See *id.* at 566-67, 581 (discussing the Townshend Act general writ controversies).

set on denying American colonists their birthright liberty as Englishmen.⁵⁵ As a result, the grievance against general warrants became one of the increasing set of grievances against Parliament that eventually prompted the American Revolution. Thus, when the newly independent American States adopted new constitutions and declarations of rights, they often included a provision banning general warrants in those declarations.⁵⁶

Moreover, when the need for a federal bill of rights became a major issue during the 1787-1788 debates regarding ratification of the proposed Federal Constitution, Antifederalists who opposed ratification warned that the new Federal Congress would be tempted to authorize issuance of general search warrants to collect customs and excise revenues for the new federal government.⁵⁷ In response, a number of state ratification conventions proposed that a federal bill of rights should include a ban against general warrants.⁵⁸ The First Congress responded to those demands by including a ban against general warrants in the Fourth Amendment when the Bill of Rights was framed in 1789. Thus, the conventional history is generally correct insofar as it treats the Fourth Amendment as a response to the earlier controversies over too-loose warrants.⁵⁹

⁵⁵ See, e.g., REID, *supra* note 30, at 197 (1986) ("For Americans, writs of assistance were grievous because they were authorized by Parliament and were yet another potential threat to rights posed by Parliament's claim to legislative supremacy.").

⁵⁶ The state warrant provisions are discussed in detail *infra* Part III. See also Davies, *supra* note 2, at 668-93.

⁵⁷ See *id.* at 609-11, 694-96, 721-22.

⁵⁸ The state ratification convention proposals are discussed *infra* notes 416-37 and accompanying text. See also Davies, *supra* note 2, at 695-96.

⁵⁹ That is not to say that the conventional account of the ban against general warrants is beyond criticism. Rather, it can be faulted for giving too much emphasis to the English Wilkesite cases (the reports of which were mostly published years after the actual decisions) and too little to the later widespread American controversies over the Townshend Act customs writs. That misemphasis has distorted the history insofar as it has tended to obscure the degree to which the state and federal bans against general warrants were prompted more by fears of arbitrary customs or revenue searches of houses, rather than of criminal arrest or search warrants.

For example, the concerns about general warrants that were expressed during the Ratification debates were overwhelmingly about use of such warrants to search houses to enforce customs or excise revenue collections. See Davies, *supra* note 2, at 601-11. In fact, Madison's novel use of the "probable cause" standard for warrants in the Fourth Amendment—it never appeared in any earlier provision or proposal—also appears to reflect a specific concern with customs searches. As I explain below, "probable cause" alone was not sufficient to justify issuance of a criminal search warrant at common law.

D. The Focused Ban Against Too-Loose Warrants

However, the conventional history distorts the historical evidence when it claims that the Fourth Amendment was meant or originally understood to address more than warrant standards themselves. Although a number of commentaries have repeated that claim, none has identified any significant evidence that the Fourth Amendment was actually meant to do anything more than prohibit issuance of too-loose warrants. In particular, no commentary has identified any instance during the framing era in which the legality of warrants or warrantless arrests or searches was assessed according to mere "reasonableness."⁶⁰

Rather, the conventional history skims past highly inconvenient facts. As I document below, the bans against general warrants in the first six of the eight state declarations that preceded the Fourth Amendment did not contain any mention of a right against "unreasonable searches and seizures" or any other language that could have reached anything other than too-loose

Rather, that standard had emerged only as a justification for issuance of customs search warrants. *See infra* notes 513-19 and accompanying text; *see also* Davies, *supra* note 2, at 703-06. Additionally, as I document below, the warrant provisions in the state ratification convention proposals for federal amendments sometimes were not integrated into the criminal procedure provisions in those texts, but appear to have been a free-standing concern. *See infra* notes 429, 437 and accompanying text. Hence, the conventional history does not adequately acknowledge the degree to which the concerns that prompted the Fourth Amendment were directed specifically at customs searches of houses.

⁶⁰ *See* Davies, *supra* note 2, at 591-601. Justice Scalia's claim that "colonial juries" decided trespass actions involving warrantless searches according to a "reasonableness" standard in *California v. Acevedo*, 500 U.S. 565, 581 (1991), is illustrative of the absence of genuine evidence for any such standard. In support of that claim, Justice Scalia cited only *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763) (one of the Wilkesite cases) and Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1178-80 (1991). However, there is no mention of anything like a "reasonableness" standard in *Huckle*, and, although Professor Amar's article did make a similar historical claim, it offered as support for that claim only a "Cf." citation to Justice Scalia's own earlier normative assertion in a law review article that search and seizure *should be* assessed according to reasonableness. *See* Amar, *supra*, at 1179 n.214, *citing* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180-86 (1989). Thus, neither source that Justice Scalia cited in *Acevedo* provided any historical evidence for a framing-era reasonableness standard. Professor Amar subsequently purported to offer evidence of a historical "reasonableness" standard in a 1994 article, but did so only by selectively quoting a statement by Lord Mansfield out of context. *See* Amar, *Fourth*, *supra* note 46, at 776, *discussed in* Davies, *supra* note 2, at 592-94.

warrants.⁶¹ For example, the first ban against general warrants in the 1776 Virginia Declaration of Rights read as follows:

Sec. 10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.⁶²

There is no language in this text that could be construed to do more than ban too-loose warrants. Additionally, even the two later state provisions that included a preamble declaring a right against “unreasonable searches and seizures” still articulated standards only for warrants.⁶³ Likewise, as I explain in more detail in Part IV, the framing of the Fourth Amendment was also focused on banning too-loose warrants. Although James Madison’s draft of the proto-Fourth Amendment used the phrase “unreasonable searches and seizures,” it took the form of a one-clause text that clearly addressed only warrant standards.⁶⁴ Moreover, in the aftermath of the framing of the Bill of Rights, judicial opinions and commentaries described the Fourth Amendment simply as a prohibition against too-loose warrants. None mentioned a “reasonableness” standard.⁶⁵

⁶¹ See *infra* notes 306, 309, 316, 320, 331, 338, 339 and accompanying text. See also Davies, *supra* note 2, at 674-84.

⁶² See, e.g., Virginia Declaration of Rights, reprinted in EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY*, app. at 172 (1979). The provisions in the state declarations and later state ratification convention proposals are reprinted in a number of sources. I cite Dumbauld’s book because it has the virtue of presenting the entire Virginia Declaration and the entire state ratification convention proposals. The early state declarations of rights are also available in *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* (William F. Swindler, ed. 1973) (11 volumes) [hereinafter, *STATE CONSTITUTIONS*]. For the Virginia warrant provision, see 10 *id.* at 48-50.

Some recent works have the disadvantage of presenting only the individual provisions from these sources, but not the overall declarations or sets of proposals. As a result, they tend to encourage an overly compartmentalized approach and to obscure the interrelationships between the rights enumerated. For an example, see *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* (Neil H. Cogan, ed. 1997) [hereinafter *COMPLETE BILL*].

⁶³ See *infra* notes 360-67, 378 and accompanying text.

⁶⁴ See *infra* notes 502-04 and accompanying text.

⁶⁵ See Davies, *supra* note 2, at 611-19.

There was no historical “reasonableness” standard; rather, the conventional history created the illusion of a Fourth Amendment “reasonableness” standard by prochronistically inserting the modern “reasonableness” concept into historical statements and documents in which it had not actually appeared.⁶⁶ For example, Lasson asserted that “[t]he principle that search and seizure must be reasonable, that there must be a balancing of the problems of the administration of justice with those of the freedom of the individual, was emerging slowly” just before he discussed seventeenth-century statements about warrant authority—even though no seventeenth-century source used the term “reasonableness” or “balancing.”⁶⁷

Additionally, Lasson gave only a superficial summary of the warrant provisions in the state declarations that preceded the Federal Bill of Rights⁶⁸ and incorrectly treated the 1776 Pennsylvania provision as though it had introduced the “reasonable-ness” standard even though it never used any form of that term.⁶⁹ As a result, Lasson glossed over the important fact that the term “unreasonable” appeared rather late in the framing of the American constitutional texts and did not inquire as to whether there might be a specific explanation as to why that term first appeared in the 1780 Massachusetts Declaration drafted by John Adams—the seventh of the eight state warrant provisions that preceded the Fourth Amendment.⁷⁰

However, the most grievous error in Lasson’s account was his completely implausible account of the framing of the Fourth

⁶⁶ A “prochronism” is a specific form of anachronism in which aspects of a later period in time are erroneously imposed on an earlier period. Prochronistic expectations pose a serious obstacle to recovering accurate legal history. See, e.g., Davies, *Crawford*, *supra* note 19, at 116 n.34.

⁶⁷ LASSON, *supra* note 45, at 34-37. See also *supra* note 60.

⁶⁸ *Id.* at 79-82.

⁶⁹ *Id.* at 81. As I document below, the Pennsylvania provision announced the right of the people to hold themselves and their houses, papers, and possessions “free from search and seizure,” but did not use “unreasonable” or any other qualifying adjective. See *infra* notes 330-33 and accompanying text.

⁷⁰ LASSON, *supra* note 45, at 82. Notwithstanding his earlier comments about the Pennsylvania provision, Lasson did note that the Massachusetts provision “offered the first expression of the phrase ‘unreasonable searches and seizures’” but he did not inquire whether there might be any connection between that statement and the earlier 1761 Boston Writs of Assistance Case. I suggest that there is a fairly direct connection. See *infra* notes 365-70 and accompanying text.

Amendment itself. The proposal for a warrant provision that was under consideration in the House of Representatives in 1789 was as follows:

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated by warrants issuing, without probable cause supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized.⁷¹

Although Lasson recognized that this single-clause text “was a one-barrelled affair, directed apparently only to the essentials of a valid warrant,”⁷² he claimed that a subsequent revision of the text into the final two-clause format was *intended* to create a broad, free-standing “reasonableness” standard.⁷³

In Lasson’s account of that revision, Egbert Benson objected to this single-clause draft on the ground “that although the clause was good as far as it went, it *was not sufficient*.”⁷⁴ However, when Benson moved to change the text to read “and no warrant shall issue”—a change that would have altered the one clause text to two clauses—the House defeated the motion.⁷⁵ Nevertheless, when Benson chaired a three-member committee of the House that was assigned to put the proposed amendments in final form for submission to the Senate, Benson was able to slip the change in anyway.⁷⁶ Thus, when the Senate approved Benson’s language, and the House ultimately endorsed it

⁷¹ See *infra* note 521. The language quoted in the text shows the provision after it was corrected by reinserting “against unreasonable searches and seizures,” a phrase that had apparently been accidentally omitted from the report of the proposed amendments. *Id.*

⁷² LASSON, *supra* note 45, at 103. Lasson wrote of Madison’s draft that “the wording of this clause was such that seemed to be directed against improper warrants only,” LASSON, *supra*, at 100-01, and that in the draft considered by the full House, “[t]he general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issue of warrants without probable cause, etc.” *Id.* at 103.

⁷³ *Id.* at 103.

⁷⁴ *Id.* (emphasis in original).

⁷⁵ *Id.* at 101 (quoting an account that the motion “lost by a considerable majority”).

⁷⁶ *Id.* Lasson described this as “[t]he most interesting thing about the passage of the Fourth Amendment.” *Id.*

as part of the overall Bill of Rights, Benson's surreptitious change became part of the Fourth Amendment.⁷⁷ On that basis, Lasson concluded:

That the prohibition against "unreasonable searches" was *intended*, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment.⁷⁸

This account was grossly implausible. Although Lasson's tale of a surreptitious change has had surprising traction among later commentators,⁷⁹ it simply reflected errors in the single account of the House debate that Lasson exclusively relied upon. Other sources indicate that the motion was almost certainly made by Eldridge Gerry rather than Benson, and also show that the House approved the change.⁸⁰

More fundamentally, Lasson's account distorted the *stated purpose* of the final change by leaving out crucial aspects of what actually had been said. Here is the full statement of the motion, which Lasson quoted but only selectively discussed:

Mr. [Gerry] objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "and no warrant shall issue."⁸¹

Note that Gerry did not voice a general objection that Madison's draft "was not sufficient"; rather, he specifically objected to the "declaratory" character of Madison's phrase that the right against unreasonable searches and seizures shall not be violated "*by warrants issuing*," and the only change he proposed was "to alter [the draft] so as to read '*and no warrant shall issue*.'"⁸² It is perfectly plain that Gerry's objection was simply

⁷⁷ *Id.* at 102-03.

⁷⁸ *Id.* at 103 (emphasis added). Lasson also claimed that the Fourth Amendment carried a "principle [of] freedom from unreasonable search and seizure" that was "broader" than the ban against too-loose warrants. *Id.* at 81.

⁷⁹ See Davies, *supra* note 2, at 718-19, n.484.

⁸⁰ See *id.* at 716-19.

⁸¹ LASSON, *supra* note 45, at 101 (quoting ANNALS OF CONGRESS) (I have altered the name of the movant from "Benson" to "Gerry.>").

⁸² *Id.* (emphasis added).

that Madison's draft *had not explicitly forbidden the issuance* of a general warrant; rather, it had referred, in a "declaratory" style, to general warrants "*issuing*." Thus, Gerry sought to make the language unambiguously imperative by commanding that "*no warrant shall issue*." That is all the change was about.⁸³ Gerry did not set out to create a broad reasonableness standard.

Moreover, there was nothing the least bit novel about the language Gerry proposed—the earlier state provisions and the proposals of the state ratification conventions had included imperative language that explicitly ordered that general warrants "not be granted."⁸⁴ Gerry simply proposed including that explicit command in the simplest way possible by inserting "and no warrants shall issue" in place of "by warrants issuing."⁸⁵

In sum, although Gerry's motion had the side-effect of dividing the text into a two-clause format, there is no evidence it was made for that purpose; rather, the final two-clause format was merely an artifact of a change made simply to state the ban against issuing general warrants more emphatically. Although numerous Supreme Court opinions and later commentaries have uncritically reiterated Lasson's claim that this final change was made for the purpose of creating a reasonableness standard broader than the standards for warrants themselves, the salient fact is that Lasson never identified any evidence that the language change had any such purpose—and neither have any of the later commentaries.⁸⁶

⁸³ See also *infra* notes 522-29 and accompanying text; Davies, *supra* note 2, at 719-22.

⁸⁴ See *infra* notes 306 (Virginia committee draft), 309 (Virginia Declaration), 316 (Maryland Declaration), 319 (North Carolina Declaration), 331 (Pennsylvania Declaration), 338 (Vermont Declaration), 340 (Delaware Declaration), 360 (Massachusetts Declaration), 378 (New Hampshire Declaration), 418 (Pennsylvania ratification convention minority proposed amendments), 423 (Maryland ratification convention proposed amendments), 429 (Virginia ratification convention proposed amendments), 431 (North Carolina ratification convention proposed amendments), 436 (New York ratification convention proposed amendments) and accompanying text.

⁸⁵ Gerry, who was from Massachusetts, may even have borrowed the phrase "no warrant shall issue" from the Massachusetts warrant provision. See Davies, *supra* note 2, at 722.

⁸⁶ Davies, *supra* note 2, at 719-20, n.489.

It is also worth noting that Lasson said little about the nature or content of the supposed historical reasonableness standard. The reason may be that, although Lasson's book was published in 1937, he discussed Supreme Court decisions only through 1927.⁸⁷ That date is significant because the Supreme Court was still generally tying the reasonableness of a search to the use of a warrant at that time; the "generalized reasonableness" approach to the Fourth Amendment that disparages the use of warrants did not appear for another two decades.⁸⁸ Thus, Lasson apparently did not anticipate that "reasonableness" could have problematic implications for the strength of Fourth Amendment protections. Instead, he still concluded with a celebratory passage that the Supreme Court's development of Fourth Amendment doctrine "has been marked in general, and especially of late, by a fine sensibility for the spirit and purpose of this fundamental safeguard in order to give it that effectiveness which its history and terms require."⁸⁹ Thus, because the Court was still interpreting the Fourth Amendment to require substantial protections, Lasson was never pressed to inquire whether a "reasonableness" standard for arrests and searches would actually have been consistent with the Framers' values and expectations.

Additionally, at the time Lasson wrote, the Supreme Court had begun to apply the Fourth Amendment to warrantless searches, but had not yet applied it to warrantless arrests. Probably for that reason, Lasson never probed the common-law standards for lawful arrest. Had he undertaken that inquiry, and had he anticipated how the modern notion of Fourth Amendment reasonableness might develop, he would not have been able to conclude that the Framers had endorsed mere "reasonableness." Rather, he would have found that the Framers' expectation had been that the law of arrest and search would be a law of rules—common-law rules.

⁸⁷ LASSON, *supra* note 45, at 106-43.

⁸⁸ The "generalized reasonableness" construction of the Fourth Amendment was first advanced in Justice Minton's majority opinion in *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

⁸⁹ LASSON, *supra* note 45, at 143.

II. "THE LAW OF THE LAND" AND "DUE PROCESS OF LAW"

Lasson's account of search-and-seizure history suffered from undue compartmentalization as well as errors. Because he seemed to have started out with an expectation that the Fourth Amendment was the only search-and-seizure provision, he skimmed past historical evidence that suggested that "due process of law" might also be relevant.⁹⁰ However, at the time Lasson wrote, his dismissal comported with the conventional history of due process, particularly as set out in Rodney L. Mott's earlier 1926 book on that topic.⁹¹ In effect, deficiencies in the conventional history of due process fed into the errors that marred the conventional history of the Fourth Amendment.

A. *The Shortcomings in the Conventional History of Due Process*

Like Lasson's account of search-and-seizure history, Mott composed what became the conventional account of due process

⁹⁰ In Lasson's survey of earlier English history, he noted that Magna Carta had been aimed at King John's practice of

taking the law into his own hands and, without legal judgment of any kind or respect for any form of legal procedure whatever, proceeding with, or send an armed force to punishment by imprisonment or seizure of property or worse, some person who displeased or disobeyed him.

LASSON, *supra* note 45, at 20. Additionally, Lasson mentioned, in connection with the Petition of Right of 1628, that Charles I had "imprisoned" opponents. *Id.* at 29-31. Nevertheless, he did not pursue these topics, and did not address the fact that a wide variety of American constitutional provisions paraphrased the law of the land chapter of Magna Carta and used words that indicated seizures of persons such as "taken," "imprisoned," and even "arrested."

Instead, Lasson downplayed the significance of the law of the land chapter of Magna Carta, and brushed aside "Coke's generally discredited exposition" of that chapter. *Id.* at 22 (citing Coke's *Institutes of the Laws of England* (London, 1671), I, 45 ff.). Lasson's reference to Coke's "discredited exposition" reflects a serious historiographic error. The relevant question for interpreting American constitutional understandings is not whether modern historians think that Coke gave correct accounts of earlier English law or even what Coke "really" meant. Rather, the important inquiry is whether framing-era Americans gave weight to Coke's views, and what they thought he meant. As I explain in this part, I think it is plain that Coke's writings, especially his chapter on the law of the land chapter of Magna Carta, exerted substantial influence on the American framing.

⁹¹ RODNEY L. MOTT, *DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE "LAW OF THE LAND"* (1926).

after the Supreme Court had already stretched “due process” to reach a wide variety of forms of business regulation,⁹² and *after* the Justices had already jettisoned the criminal procedure content that term might have seemed to carry.⁹³ Thus, like Lasson, Mott did not so much ask whether the Supreme Court’s construction of “due process” was consistent with the historical understanding, but rather construed the historical materials in light of the Supreme Court’s announced doctrine.

Although Mott concluded that “due process of law” had historically connoted common-law rights,⁹⁴ he insisted that that concept had always carried a variety of broad and indefinite meanings rather than “merely guaranteeing proper procedure in criminal cases.”⁹⁵ As a result, although he recognized that “the

⁹² See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1877) (assessing whether state business regulation was “reasonable”); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (overturning Louisiana law requiring all businesses doing business with Louisiana residents to pay fees to the state); *Lochner v. New York*, 198 U.S. 45 (1905) (overturning state maximum working hours law); *Adair v. United States*, 208 U.S. 161 (1908) (voiding federal statute that prohibited dismissals of employees of interstate common carriers for union membership); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (striking down minimum wage set by District of Columbia commission).

⁹³ See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884), discussed *infra* notes 613-21 and accompanying text.

⁹⁴ MOTT, *supra* note 91, at 142 (noting that “There is also little question that the colonists looked upon the ‘law of the land’ as being the common law of England and that it embodied the general rights and privileges of Englishmen”).

⁹⁵ *Id.* at 123. For example, Mott concluded that:

It is evident that the colonists looked upon due process of law as a guarantee which had a wide, varied and indefinite content. At no time was there any serious attempt to define it, and it is noteworthy that they should seize upon these particular words under such diverse circumstances. It is not probable that any of the colonists realized how much was wrapped up in the [law of the land chapter] of the Great Charter, but it is certain that many of them realized that it had a much wider import than merely guaranteeing proper procedure in criminal cases.

Id. For clarity, I have replaced Mott’s reference to the “thirty-ninth section” of Magna Carta with “law of the land chapter”; although modern works often assign the number 39 to that chapter, framing-era sources followed Coke in designating it as the twenty-ninth chapter. See *infra* note 108.

Similarly, Mott also wrote:

[T]he colonies had invoked the protection of [Magna Carta] in such a variety of cases and under such a variety of conditions that to say they had any definite concept of the meaning of any portion of it is impossible. It is certain that it did not mean the same thing to everyone.

English conception of due process has always revolved around the idea of criminal procedure in one form or another,”⁹⁶ and also even recognized that the earliest references to “due process of law” in American colonial texts had used that term in the context of criminal procedure,⁹⁷ he nevertheless downplayed the historical criminal procedure contents of “due process of law.”

In particular, although Mott generally acknowledged that Sir Edward Coke had invoked the “law of the land” chapter of Magna Carta in the struggle against arbitrary arrests and punishments during the reigns of James I and Charles I, and that Coke’s writings exerted substantial influence on the American Founders,⁹⁸ Mott nevertheless omitted to say much about what Coke had actually written about the contents of that chapter of Magna Carta.⁹⁹ Additionally, although Mott provided detailed accounts of nineteenth-century judicial interpretations of “the law of the land” and “due process of law” in American state

There are, however, some general observations which can be made. It seems quite certain that a trial by jury according to the regular forms of the common law was considered essential to due process. There is also little question that the colonists looked upon the “law of the land” as being the common law of England and that it embodied the general rights and privileges of Englishmen. Due process of law in this light appears to be a catch-all phrase for human rights rather than a phrase with a well defined content. Nevertheless, its ambiguity must not be taken to prove that the colonists did not consider that it limited the legislative bodies as well as the executive or judiciary. The evidence on this matter is clearly all on one side. Practically without exception, strenuous objections were raised whenever the colonists were met with a situation involving a legislative violation of due process of law. So overwhelming is the proof of the importance of this protection in this regard that it is difficult to understand how there would have been any serious question regarding it when the courts considered it a half century later. It was, indeed, the very importance which was universally attached to the thirty-ninth section of the Great Charter that produced its complexity. This complexity, it carried with it into the fundamental law of the new nation.

MOTT, *supra* note 91 at 141-42.

⁹⁶ *Id.* at 83 (but also noting that even in England there has been an “intermittent stream of statements which indicate that the [law of the land chapter of Magna Carta] is broader than frequently has been thought”).

⁹⁷ *Id.* at 97-98, n.43 (noting that a 1692 Massachusetts Bay statute that was “in the nature of a Declaration of Rights” provided that “No man, of what state or condition soever, shall be put out of his lands, or tenements, nor be taken or imprisoned nor disherited nor banished nor any ways destroyed, without being brought to answer by due process of law”).

⁹⁸ *Id.* at 76-80.

⁹⁹ *Id.* at 75-83.

property and regulatory cases, he only superficially skimmed the framing and contents of the pertinent state and federal constitutional provisions themselves.¹⁰⁰

As a result, Mott's seemingly detailed discussion of due process did not really put his readers on notice of the degree to which "due process of law" had historically addressed pretrial criminal procedure. Probably for that reason, that content is also missing from later works on the history of due process.¹⁰¹ Indeed, that content is now so obscure that some recent works that have purported to describe the historical meanings of the criminal procedure provisions of the Bill of Rights omit the Fifth Amendment Due Process Clause altogether.¹⁰²

¹⁰⁰ *Id.* at 143-44, 168 (discussing briefly the state constitutions adopted prior to the Federal Bill of Rights); *id.* at 145-61 (discussing the general history of the framing of the Federal Bill of Rights but paying relatively little specific attention to the framing of the "due process of law" clause in the Fifth Amendment).

¹⁰¹ See, e.g., JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* (2003); Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 213 (Eugene W. Hickock, Jr., ed., 1990). Professor Dumbauld has also offered a fairly typical account of the "essence" of "due process of law":

The notion of due process of law is derived historically from Magna Charta. The essence of its meaning was that no person could be punished by the king's government save for a violation of law (which the people participated in making) and after a jury trial (which the people participated in administering). These twin pillars of freedom were deemed essential features of American government by patriots such as Samuel Adams and Thomas Jefferson, who were at all times mindful of the unrelenting struggles against the arbitrary power of the crown which emblazoned the history of English constitutional practice.

DUMBAULD, *supra* note 62, at 90 (footnotes omitted).

¹⁰² For example, Professor Leonard Levy discussed the self-incrimination, double jeopardy, and grand jury indictment provisions in the Fifth Amendment, but omitted any mention of the "due process of law" clause in that Amendment except for a passing mention that Madison had used that terminology instead of "the law of the land." See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 180-230, 247-48 (1999). Similarly, Professor Akhil Reed Amar discussed only the self-incrimination clause of the Fifth Amendment in his 1997 book. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997). Other works also frequently ignore the significance of the "due process of law" clause in the Fifth Amendment as well as the "law of the land" clauses in the state declarations and constitutions when summarizing the rights included or proposed for declarations or bills of rights. For example, one recent synopsis of the proposals for a federal bill of rights put forward by Pennsylvania Antifederalists mentions "the right of trial by jury," "[t]he right of defendants to confront their accuser and a prohibition of self-incrimination," "[a] prohibition of excessive bail and fines and of cruel and unusual punishment," and "[a] prohibition of general warrants"—but omits any mention of the "law of the land" guarantee that those Antifederal-

The path to correcting this omission is straightforward; it consists of simply paying attention to what Mott and later due process commentators have ignored. In this part, I explicate the pretrial criminal procedure contents that Coke actually assigned to the “law of the land” chapter of Magna Carta. Then, in the next two parts, I work through the “law of the land” and “due process of law” provisions that were included in the state declarations and Federal Bill of Rights and show that these provisions also addressed pretrial criminal procedure, including arrest standards.

B. Magna Carta, Coke, and the Whig Canon

There is no doubt that the American Framers were well versed in the Whig canon of English constitutionalism. Indeed, the American Framers widely accepted the Saxon myth in which English constitutional history was presented as a long struggle by the English people to regain their immemorial birthright of liberty following the Norman Conquest and the oppressions of later monarchs.¹⁰³ In particular, the American Framers were quite familiar with both the then-famous “law of the land” chapter of Magna Carta and Sir Edward Coke’s then-famous explication of that chapter. Thus, to recover the Framers’ understanding, one must first recover the framing-era content assigned to “the law of the land” in Magna Carta.

1. Magna Carta

Magna Carta was the product of a running conflict between early English monarchs and their immediate feudal vassals, the barons. The monarchs demanded that the barons provide the crown with money and manpower, especially for foreign wars. In the early thirteenth century, King John injudiciously overreached in making such demands. In response, the barons of the kingdom gathered an army and threatened civil war unless

ists also proposed. See SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828*, at 32 (1999).

¹⁰³ See, e.g., A. E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 108-12 (1968) (discussing the acceptance of Whig History in colonial America).

John recognized and guaranteed their rights in writing. When the two sides met at Runnymede in 1215, the barons presented John with their list of nonnegotiable demands—the document that became known as Magna Carta, the Great Charter. John capitulated and agreed.¹⁰⁴ John was not true to his word, and subsequently reneged on the guarantees in the charter. Nevertheless, on thirty-some later occasions involving political crises or transfers of the crown, Magna Carta was reconfirmed by the crown or enacted as a statute by Parliament, sometimes with minor alterations.¹⁰⁵

To a contemporary reader, Magna Carta appears to be a somewhat disordered collection of archaic and sometimes patently trivial provisions. However, the “law of the land” chapter in Magna Carta—as construed in Coke’s writings—became a central component of the Whig ideology that would later shape the constitutional ideology of the American Founders and Framers.¹⁰⁶

2. The “Law of the Land” in Magna Carta 29

Coke discussed the version of Magna Carta that had been reconfirmed in the ninth year of Henry III (1225).¹⁰⁷ As a result, that was the version of Magna Carta with which the American Framers were most familiar. In that version, the law of the land chapter was designated as chapter 29, and I refer to it as “Magna Carta 29.” (In other editions, the same content was as-

¹⁰⁴ See, e.g., SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 1-22 (Richard L. Perry & John C. Cooper, eds., 1959) [hereinafter “SOURCES”] (discussing the historical setting of Magna Carta and setting out the document itself). See also MOTT, *supra* note 91, at 1-8 (discussing antecedents and variations of Magna Carta).

¹⁰⁵ See, e.g., MOTT, *supra* note 91, at 23-31 (discussing the aftermath of Magna Carta and setting out the Confirmatio Cartarum of 1297, one of the reaffirmations of Magna Carta).

¹⁰⁶ See, e.g., JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF THE AMERICAN CONSTITUTION (1992).

¹⁰⁷ 2 COKE, *supra* note 13, first unnumbered page after the opening “Proeme” (reciting “MAGNA CARTA. EDITA Anno nono H. III”). Coke apparently chose this version because it had been “established by the authority of parliament” and “so entered into the parliament roll” as a statute. 2 *id.* “A Proeme” (pages unnumbered). This 1225 version of Magna Carta appears as the first statute in the first volume of the various editions of the English STATUTES AT LARGE.

signed chapter numbers 39 and 40.¹⁰⁸) Coke translated Magna Carta 29 from the Latin as follows:

No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgement of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.¹⁰⁹

This chapter became the foundational component of the Whig canon of English liberty during the later seventeenth-century struggle to curtail the prerogative power of the crown because Whigs construed it as documentary evidence that the “immemorial rights” of the English people placed common-law limits on the prerogative powers of the crown. It is worth noting here that some of the later reconfirmations of Magna Carta had rendered “law of the land” by the somewhat more specific term “due process of law.”¹¹⁰

3. The Whig Struggle for Common-Law Securities

The large issue in English constitutionalism during the seventeenth century was the conflict between the crown’s claim to prerogative powers and the gentry’s insistence that even the crown was obliged to respect the basic common-law rights of the English people. The struggle came to a head when James I, the first of the Stuart monarchs, ascended to the throne in 1603. James, who adhered to the divine right of kings, asserted a

¹⁰⁸ The chapter numbering for Magna Carta varies depending on the edition used. The chapters in the original 1215 text were not numbered. Modern scholarship on Magna Carta tends to assign the chapter number 39 to the law of the land chapter. However, one does not encounter references to Magna Carta 39 in framing-era sources; rather, they follow Coke in referring to Magna Carta 29. See Davies, *supra* note 2, at 671 n.332.

¹⁰⁹ 2 COKE, *supra* note 13, at 45. (In the other chapter numbering, all but the last sentence of this passage is chapter 39, while the last sentence (“we will sell . . .”) is separately numbered as chapter 40.)

¹¹⁰ A 1354 English Statute, 28 Edw. III. c. 3, stated, “[n]o Man of what Estate or Condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.” See Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 266 (1975).

broad claim of his prerogative.¹¹¹ Sir Edward Coke emerged as a leading opponent of that claim. As a judge of the central royal courts, Coke initially insisted that common-law adjudication was insulated from the king's interference. In a famous exchange, Coke informed the king that the king was not competent to participate personally in the decision of cases in his royal courts because the king lacked the necessary knowledge of the artificial reason of the law.¹¹² However, in a subsequent conflict, the king removed Coke from the bench.¹¹³

Coke then began to play a role as a member of the Whig faction in the House of Commons in Parliament. Taxes again became a salient issue when James demanded additional revenues, but Parliament declined to provide James with all of the revenues that he demanded. The conflict over taxes increased when Charles I succeeded to the throne in 1625. In the face of Parliament's intransigence, Charles resorted to collecting additional revenues by such subterfuges as forced "loans" and "ship money" assessments. Whigs viewed those collections as a violation of the common-law right of Englishmen not to be taxed without "consent"—that is without the constructive consent of their representatives in Parliament (the common-law principle that American Whigs would later restate as "no taxation without representation"). When some members of the gentry refused to make such "loans," royal revenue officers arrested and imprisoned them—without ever asserting any criminal charge—and the king's judges refused to order the release of such persons in habeas corpus proceedings. As a result, criminal procedure became a salient issue in the larger constitutional struggle.¹¹⁴

In 1628, Whigs in the House of Commons, led by Coke, insisted that common law was an English birthright, and invoked the "law of the land" and "due process of law" guarantees asso-

¹¹¹ See, e.g., DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 328-31 (1999) (reprinting excerpts of James I's Charge to the Judiciary).

¹¹² *Prohibitions del Roy*, 12 Coke Rep. 63, 77 Eng. Rep. 1342 (1608) (stating that the king could not personally participate in judicial decision-making in court cases).

¹¹³ See COQUILLETTE, *supra* note 111, at 342-53 (excerpting material from the 1616 *Case of the Commendams*).

¹¹⁴ See SOURCES, *supra* note 104, at 62-65 (discussing the *Five Knights' Case*, also called *Darnel's Case*, 3 St. Tr. (1719 folio ed.) 1, 3 How. St. Tr. 1 (K.B. 1627)).

ciated with Magna Carta 29 as authority for that claim. During the debate, Coke was said to have asserted that "Magna Carta is such a Fellow, that he will have no Sovereign."¹¹⁵ The Whigs then presented their claims of rights, including, among others, the claim of entitlement to common-law procedure and the right of consent to taxation, in the Petition of Right.¹¹⁶

In pertinent part, the Petition complained that the king's subjects had been illegally "imprisoned, confined, and sundry other ways molested and disquieted," recited the text of Magna Carta 29 and cited related statutes (including one requiring "due process of law"¹¹⁷), complained that "no cause was certified" to justify imprisonments when they had been challenged in habeas corpus proceedings in the courts, and demanded that the king reaffirm, among other things, "that no freeman, in any such manner as before-mentioned, be imprisoned or detained."¹¹⁸ Charles initially offered only an ambiguous response to the Petition, but when that was not accepted he eventually acceded (but then dissolved Parliament and governed arbitrarily, anyway).¹¹⁹

C. Coke's Rendition of the Law of Warrantless Arrest in Magna Carta 29

Coke's role in the Whig struggle lent increased stature to his legal commentary. Indeed, Coke's writings—which included

¹¹⁵ It appears that Coke may actually have made the somewhat tamer statement that "Magna Carta is such a Fellow, that he will have no *saving*," but that the final word was corrupted to "sovereign" in a later source. See STONER, *supra* note 106, at 46. Nevertheless, it appears that the American Framers were familiar with the "sovereign" version. See, e.g., HOWARD, *supra* note 103, at 182 (quoting William Henry Drayton's 1774 quotation, attributed to Coke, that "Magna Charta is such a fellow that he will have no sovereign").

¹¹⁶ *Id.* at 65-69 (discussing the debate in Parliament). Another grievance addressed in the Petition was the quartering of troops in private houses. *Id.*

¹¹⁷ After quoting Magna Carta 29, the Petition of Right also recited the statute 28 Edw. III, c. 3, to the effect "[t]hat no man of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited, nor be put to death without being brought to answer by due process of law." See SOURCES, *supra* note 104, at 73, 74. The Petition also recited another statute to the same effect, though it did not use the term "due process of law." See *id.* (reciting 25 Edw. III, stat. 5, c. 4).

¹¹⁸ SOURCES, *supra* note 104, at 73-75 (setting out the Petition of Right).

¹¹⁹ *Id.* at 69-70.

eleven volumes of case reports¹²⁰ and a four-volume treatise titled *The Institutes of the Laws of England*¹²¹—became prominent components of the Whig canon, and exerted considerable influence on American constitutionalism.¹²²

Because Coke's *Institutes* comprised the earliest comprehensive commentary on English law generally, and common law in particular, lawyers and judges from the Framers' generation learned law by reading the *Institutes*,¹²³ and both the *Institutes* and *Coke's Reports* were widely cited in the other treatises and manuals available in framing-era America.¹²⁴ Moreover, Coke's writings were held in the highest regard. For example, Thomas Jefferson said of Coke that "a sounder Whig never wrote, nor a profounder learning in the orthodox doctrines of the British Constitution, or in what was called British liberties,"¹²⁵ and John Rutledge of South Carolina wrote in 1769 that "Coke's *Institutes* seem to be almost the foundation of our law."¹²⁶

Two chapters in the *Institutes* are especially important for the present topic: Coke's chapter on Magna Carta 29 in the *Second Institute* and his chapter on the office of the justice of the peace, in which he discussed arrest and search warrants, in the *Fourth Institute*. The first of these, Coke's chapter on Magna Carta, was probably regarded as the most important of Coke's writings, and there is ample evidence that framing-era Americans were familiar with its contents.¹²⁷ For present pur-

¹²⁰ For bibliographic information, see 1 MAXWELL, *supra* note 13, at 295-97 (publication in French commenced 1600; eleven volumes published in English 1658).

¹²¹ For bibliographic information, see 1 MAXWELL, *supra* note 13, at 21 (generally); 449-52 (first volume, also known as *Coke on Littleton*); 546 (second volume, also known as *Coke on Magna Carta*); 360 (third volume); 258 (fourth volume).

¹²² See, e.g., WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT* 20-21 (1998) (noting that Chief Justice Sir Edward Coke was "the supreme exponent" of the English constitutional tradition that held that "a legislature might not infringe legally created rights, such as those recognized at common law . . . or by traditional institutional procedures"); TREVOR H. COLBURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE ORIGINS OF THE AMERICAN REVOLUTION* (1965); CHARLES F. MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION* (1933, reprinted 1966).

¹²³ See, e.g., HOWARD, *supra* note 103, at 117-25.

¹²⁴ Framing-era criminal procedure treatises and justice of the peace manuals are discussed *infra* notes 217-20 and accompanying text.

¹²⁵ See 12 *THE WRITINGS OF THOMAS JEFFERSON* iv (Julian Boyd ed., 1950).

¹²⁶ See HOWARD, *supra* note 103, at 128.

¹²⁷ For example, James Otis, who argued against general writs of assistance in the 1761 Boston case, had made marginal markings in the "law of the land" chapter in his

poses, the notable feature of Coke's chapter on Magna Carta 29 is that it set out a fairly comprehensive discussion of the common-law of arrest, including especially warrantless arrest. Because Coke's writings sometimes assume knowledge on the part of the reader, it is worthwhile to work through the relevant contents of this chapter.

1. Coke's Chapter on Magna Carta 29

Coke's "Proeme" (that is, preface) to the second volume of the *Institutes* made it clear that Magna Carta, the first of the historic statutes discussed in that volume, was of supreme importance. Notably, Coke did not characterize Magna Carta as the source of English rights. Rather, he described it as being "for the most part declaratory of the principall grounds of the fundamentall laws of England . . ." ¹²⁸ He also noted that it had been "adjudged in parliament" that it "should be taken as the common law," ¹²⁹ and that if any statute were made contrary to Magna Carta it would be "holden for none" (that is, void). ¹³⁰ Thus, although Magna Carta was not the complete English constitution, it certainly comprised a part of it.

Coke began his chapter on Magna Carta 29 by quoting that text in Latin and translating it into English, as set out above. ¹³¹ Coke then construed the language of that chapter phrase by phrase. At the outset, he broadly defined the "freemen" who enjoyed the protection of the chapter, and then described the

copy of Coke's *Second Institute*, and he referred to that chapter in his 1761 argument. See Quincy's Reports 483 app. I. E. (titled "Otis's Quotations from Coke on Magna Carta, cap xxix"). John Adams invoked Coke's discussion of Magna Carta 29 on several occasions. See *infra* note 369 and accompanying text. Likewise, Alexander Hamilton still quoted from Coke's chapter on Magna Carta 29 when he construed the meanings of "the law of the land" and "due process of law" in 1787. See *infra* note 394 and accompanying text. Coke's chapter on Magna Carta 29 was reprinted or abstracted in a number of other works available in framing-era America. See *infra* notes 249-58 and accompanying text.

¹²⁸ 2 COKE, *supra* note 13, at "A Proeme" (pages unnumbered). See also REID, *supra* note 30, at 68-69 (noting that Magna Carta was regarded as "a statement of ancient common-law privileges").

¹²⁹ 2 *id.* at Proeme (pages unnumbered) (referring to the statute "25 E. 1.").

¹³⁰ 2 *id.*

¹³¹ See *supra* text accompanying note 109.

chapter as containing “nine several branches” (or topics) which he proceeded to list.

The first of the nine branches Coke identified was the requirement that arrest and imprisonment be “*per legem terrae*”—that is, according to “the law of the land,” or the law of England. Coke identified this “branch” as being of the first importance:

1. That no man be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custome of England; for these words, *per legem terrae*, being towards the end of this chapter, doe referre to all the precedent matters in this chapter, and this hath the first place, because the liberty of a mans person is more precious to him, then all the rest that follow, and therefore it is great reason, that he should by law be relieved therein, if he be wronged, as hereafter shall be shewed.¹³²

After the initial listing and brief discussion of each of the nine “branches,” Coke returned to a more detailed discussion of each. Regarding the first branch, he wrote:

(3) *Nullus liber homo capiatur, aut imprisonetur.*] Attached and arrested are comprehended herein.

1. No man shall be taken (that is) restrained of liberty, by petition, or suggestion to the king, or to his councell, unless it be by indictment or presentment of good, and lawfull men, where such deeds be done.¹³³

Coke then had more to say about arrest in a subsequent discussion of “*Nisi per legem terrae*”—“unless by the law of the land”—a discussion in which he referred repeatedly to “due process of law” as the requisite for a man’s being brought to answer (that is, held for trial) in a criminal prosecution:

¹³² 2 COKE, *supra* note 13, at 45.

¹³³ 2 *id.* at 46-47. The Latin passage “*Nullus liber homo capiatur, aut imprisonetur*” translates as “[n]o Freeman shall be taken, or imprisoned.” 2 *id.*

For present purposes, “attached” was a form of arrest. Technically, a person was “attached” when he was “take[n] or apprehend[ed] by commandment of a writ or precept.” See, e.g., 1 GILES JACOB, A NEW LAW DICTIONARY 157 (First American ed., 1811).

(8) *Nisi per legem terrae.*] But by the law of the land. For the true sense and exposition of these words, see the statute of 37 E. 3. cap. 8 where the words, ["but] by the law of the land,[" are rendered ["]without due process of law,[" for there it is said, [just as] though it be contained in the great charter, that no man be taken, imprisoned, or put out of his free-hold without process of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ original of the common law.

Without being brought in to answer but by due process of the common law.

No man be put to answer without presentment before justices, or thing of record, or by due proces, or by writ original, according to the old law of the land.¹³⁴

As this passage makes clear, Coke did not treat "process" in "due process" as a general term for "procedure"; rather he used "process" in the more specific sense of a "writ original" or an "indictment or presentment" by a grand jury—that is, as a term for the written authority for a civil lawsuit for damages or a criminal prosecution.¹³⁵ (An "original writ" was required for a

¹³⁴ 2 COKE, *supra* note 13, at 50 (material within double brackets added). The Latin passage "*Nisi per legem terrae*" means "but by the law of the land." 2 *id.* I have inserted several words and quotation marks to avoid a potential misreading of this text. Coke's passage "*see the statute of 37 E. 3. cap. 8 where the words, by the law of the land, are rendered without due process of law*" is potentially confusing because it may initially seem that Coke was distinguishing "law of the land" from "due process of law" insofar as he used "by" the law of the land, but used "without" due process. Actually, however, 37 E. 3. cap. 8 simply *substituted* "due process of law" for "the law of the land." Coke's passage is confusing only because he omitted to include the word "but" in "*but by the law of the land.*" (See the quote of Magna Carta 29, *supra* note 109.) Thus, it appears that what Coke actually meant was that "without due process of law" took the place of "*but by the law of the land.*" Likewise, the passage "though it be contained in the great charter" would appear to mean "*just as though*" the words had appeared in the great charter itself.

¹³⁵ The reference to "writ original of the common law" refers to the "original writ" that was used to confer jurisdiction on a court to try a civil "action" (lawsuit) for damages. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 116-17 (1st ed. 1765). See also 3 *id.* (1st ed. 1768) at 270-78 (Chapter 18: "*Of the PURSUIT of REMEDIES by ACTION; and, first, of the ORIGINAL WRIT*").

It is important, when addressing the original understanding of the state declarations and Federal Bill of Rights, to use the editions of treatises that Americans actually consulted during the framing era. The first printings of the four volumes (1765 to 1769) of Blackstone's *Commentaries* were reprinted in Philadelphia in 1771-1772, and were in

civil action for damages, and—unlike modern practice—defendants in such lawsuits were commonly arrested or “attached” to assure their appearance in court; thus, arrest was important in both criminal and civil contexts.)¹³⁶

There is a significant shift in the passage just quoted that should be noted: although Coke initially described “law of the land” to include “the common law, statute law, or custome of England,” in this later passage he asserted that “the true sense” of “by the law of the land” was “due process of law,” a term that he then defined in terms of the process issued by the common-law courts. Thus, Coke rendered “due process of law” as a somewhat narrower, more precise term than “law of the land” and specifically linked “due process of law” to the requirement that a felony prosecution be based on an indictment.¹³⁷

Following this passage, Coke briefly discussed the invalidity of a former statute that had conflicted with the requirement of indictment that was basic to “due process of law”¹³⁸ and also mentioned that the law of the land provided some (limited) pro-

wide circulation in the colonies and early states. Hence, the American Framers were most likely to consult that edition. Additionally, there would have been a question whether changes Blackstone made in later editions to reflect English developments after 1776 would have been regarded as American law. For those reasons, the conventional practice of citing the “star-paginated” editions of Blackstone’s *Commentaries* is usually inappropriate if one is assessing framing-era American understandings. The “star-paginated” editions are based on the 1783 ninth London edition, the last to which Blackstone personally made changes or additions. However, no American printing that incorporated those changes was published until 1790, after the framing of the Federal Bill of Rights.

For an example of a significant misuse of the wrong edition of Blackstone by the Supreme Court, see Davies, *Arrest*, *supra* note 3, at 297-98 (discussing the Supreme Court’s erroneous interpretation of the original meaning of the Speech and Debate Clause).

¹³⁶ See 3 BLACKSTONE (1st ed, 1768), *supra* note 135, at 279-92 (discussing arrest of the defendant as an aspect of “Process” in civil lawsuits for damages).

¹³⁷ Coke appears to have emphasized indictment in defining due process of law because he also treated indictment as a requisite for an arrest or search warrant. See *infra* notes 188-92 and accompanying text. Thus, when he wrote that due process required indictment that also implicated an arrest standard. That may explain why, in some passages on “due process,” he did not refer to arrest warrants, as such, but only to indictments.

¹³⁸ 2 COKE, *supra* note 13, at 51 (stating that an act of parliament that had permitted justices of the peace to try prosecutions on the basis of “a bare information for the king before them made,” but in the absence of an indictment, violated “this fundamentall law” and resulted in abuses, but was later “made voide, and repealed by parliament”).

tections associated with examination upon interrogatories (although the fuller protection against self-accusation had not yet developed when Coke wrote).¹³⁹ Coke then returned to a more extended discussion of the content of the “law of the land” as it pertained to arrest and pretrial imprisonment.

As I explain below, Coke assumed that arrests would usually be by arrest warrant if an indictment had first been obtained (and that an indictment was usually required for the issuance of a warrant).¹⁴⁰ However, Coke then turned his discussion to the standards for arrests “*before*” indictment:

Now here it is to be knowne, in what cases a man by the law of the land, may be taken, arrested, attached, or imprisoned in case of treason or felony, before presentment, indictment, &c. Wherein it is to be understood, that process of law is two fold, viz. By the kings writ, or by due proceeding, and warrant, either in deed, or in law without writ.¹⁴¹

This discussion of “process of law” for arrest is of crucial importance, because it indicates that common-law authority for *warrantless* arrests constituted a form of “process of law.” The reference to an arrest “[b]y the kings writ” is most likely a reference to an arrest of the defendant at the commencement of a civil lawsuit based on an “original writ”;¹⁴² however, the reference to arrest “by due proceeding, and warrant, either in deed, or in law *without writ*” refers to criminal arrests. In this passage Coke used the term “warrant” as a synonym for “authority”: an arrest by a “warrant . . . in deed” (that is, by a formal, written warrant) would be what we would call a warrant arrest, while an arrest by “warrant . . . in law without writ” would be what we now describe as a *warrantless arrest*.

¹³⁹ The protection that Coke mentioned was for the person being examined to be allowed to take time to respond, to do so in writing, and to have a copy of his response to the interrogations. 2 *id.* at 51.

¹⁴⁰ See *infra* notes 188-92 and accompanying text.

¹⁴¹ 2 COKE, *supra* note 13, at 51.

¹⁴² See *supra* note 135.

2. Coke's Rendition of Warrantless Arrest Standards

Coke then made a number of statements about justifications for *warrantless* arrests. He first stated:

As first, where there is any witsnesse against the offender, he may be taken and arrested by lawfull warrant, and committed to prison.¹⁴³

To the modern eye, this statement about arrest “by lawfull warrant” may appear to discuss an arrest by a judicial warrant, but that is not what Coke meant, or what eighteenth-century readers would have understood him to mean. As I explain below, Coke took the view in the fourth volume of the *Institutes* that an arrest warrant usually could be issued only after indictment,¹⁴⁴ but this statement appears in Coke’s discussion of “[in] what cases a man by the law of the land, may be taken, arrested, attached, or imprisoned in case of treason or felony, *before presentment, indictment, &c.*”¹⁴⁵ Thus, the arrest by “lawfull warrant” in this statement referred to an arrest by “warrant in law without writ”—that is, a warrantless arrest.

Moreover, this passage appears to state the basic common-law *ex post* standard that a felony (or treason) arrest was lawful if the person was subsequently convicted of the felony for which the arrest was made, and the corollary that a person who actually witnessed commission of a felony could make a lawful warrantless arrest.¹⁴⁶ Note that it refers to the arrest of “the offender” rather than of the accused, and also refers to there being a “witsnesse” to the crime. This statement appears to use “witsnesse” in the legal sense of a person who testifies, under oath, to

¹⁴³ 2 COKE, *supra* note 13, at 51.

¹⁴⁴ See *infra* note 189 and accompanying text. Although Coke conceded that the issuance of felony arrest warrants had been relaxed somewhat by the mid sixteenth-century Marian statutes, he still took the position that a pre-indictment warrant could authorize a constable only to keep the peace while the complainant made the actual arrest—thus the warrant did not justify the arrest itself. See *infra* notes 190-91 and accompanying text.

¹⁴⁵ See passage quoted *supra* text accompanying note 141 (emphasis added).

¹⁴⁶ See *infra* note 223 (entries 1 and 2). See also Davies, *supra* note 2, at 631 n.223. Note that this *ex post* justification did not excuse a warrantless arrest for a misdemeanor, but only for a felony. *Id.* at 630, n.222.

direct knowledge of the “offendor[’s]” guilt.¹⁴⁷ Moreover, because criminal trials offered little in the way of protections for a defendant in Coke’s time, if there was a direct witness against a defendant it was highly likely that he would be convicted.¹⁴⁸

The more difficult issue at common law was whether a warrantless arrest of a person who was later not prosecuted or acquitted could be justified—that is, whether a *mistaken* arrest was excusable rather than being an actionable trespass. Coke began his discussion of this topic by stating the following:

When treason and felony is committed, and the common fame and voice is, that A. is guilty, it is lawfull for any man, that suspects him, to apprehend him.¹⁴⁹

Three aspects of this statement are significant.

First, this justification applies only to arrests for treason or felony, but not for lesser offenses. That was an important limitation on warrantless arrests because the category of felonies was narrower than it is today.¹⁵⁰

Second, this justification requires that treason or felony have been committed in fact—that is, a warrantless arrest could be lawful only if a felony “is committed” (not just probably committed).¹⁵¹ This requisite for a lawful warrantless felony arrest was also routinely reiterated in the framing-era treatises.¹⁵² The implicit conception seems to have been that authority for an arrest arose from the fact that a treason or a felony had been

¹⁴⁷ See, e.g., Davies, *Hearsay*, *supra* note 3, at 396, 407 (quoting statements by Sergeant William Hawkins and Chief Baron Geoffrey Gilbert).

¹⁴⁸ In Coke’s time, in criminal trials, defendants were not entitled to counsel, the principle that witnesses against the defendant had to testify in person and be subject to cross-examination had not solidified, the defendant was not permitted to be a witness and testify under oath in his own behalf, and witnesses for the defendant were not permitted to testify under oath.

¹⁴⁹ 2 COKE, *supra* note 13, at 51. After this statement, Coke also quoted Bracton’s earlier statement that “[t]he rumour which begets a suspicion ought to arise from good and serious men, not men of ill will and slanderers, but careful and trustworthy persons, and it must not be only on one occasion, but frequently that complaint arises and bad reputation is manifested.” 2 *id.* (translated from the Latin in 2 SELECTED WRITINGS OF EDWARD COKE 861 n.77 (Steve Sheppard ed. 2003) [hereinafter COKE’S WRITINGS]).

¹⁵⁰ See, e.g., Davies, *Arrest*, *supra* note 3, at 283-84 (noting, for example, that neither attempted murder nor kidnapping was a felony at common law).

¹⁵¹ See Davies, *supra* note 2, at 632-33.

¹⁵² See *infra* notes 222, 239, 257 and accompanying text.

committed; hence, if there had not been an actual crime, a warrantless arrest could not be lawful.¹⁵³

Third, this justification meant that a lawful warrantless arrest could be made only by a man who *personally* “suspect[ed]” the arrestee of the committed felony (that is, person A could not arrest another person on the basis of person B’s suspicion). This requisite for a lawful warrantless arrest was also routinely reiterated in the framing-era treatises. Although it may sound metaphysical, it carried the significant practical implication that the person who initiated the arrest had to be prepared to present proof of the defendant’s guilt. Thus, a peace officer could not justify a warrantless arrest he initiated simply by reference to someone else’s personal “suspicion.”¹⁵⁴

Coke then added an even more detailed discussion of the basic common-law rule for a lawful warrantless felony arrest:

If treason or felony be done, and hath just cause of suspicion, this is a good cause, and warrant in law, for him to arrest any man, but he must shew in certainty the cause of his suspicion: and whether the suspicion be just, or lawfull, shall be determined by the justices in an action of false imprisonment brought by the party grieved, or upon a *habeas corpus*. &c.¹⁵⁵

This passage again sets out the requirements (1) that the felony or treason (not just a misdemeanor) (2) “be done”—that is, actually committed—and (3) that the arresting person must act on “his [own] suspicion.” Moreover, the arresting person’s suspicion must be “just” and he must be able to show it “in certainty”—that is, the grounds for suspecting a particular person must be strong. Additionally, the validity of a warrantless arrest can be tested by habeas corpus prior to trial, and if the requisites of a valid arrest were not met, an acquitted arrestee was

¹⁵³ See also 2 COKE, *supra* note 13, 590 (stating with regard to imprisonment that it was not a crime for a person to escape from prison if no arrest warrant had been issued and no felony had actually been committed).

¹⁵⁴ See also *infra* text accompanying note 224.

¹⁵⁵ 2 COKE, *supra* note 13, at 52. A mark appears in the margin of this passage in James Otis’s personal copy of Coke’s *Second Institute*. See Quincy’s Reports 483.

entitled to bring an "action," a civil lawsuit for damages, against the person who arrested him.¹⁵⁶

Coke next addressed several specific situations which, in effect, amounted to alterations or exceptions to the stringent standards that usually applied to a warrantless felony arrest. For example, Coke noted that if a person who is suspected of felony "fleeth, or hideth himselfe, it is a good cause to arrest him."¹⁵⁷

Coke also noted that an arrest could be made without warrant under the "hue and cry," but, again, only when "[a] felony is done":

A felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be by warrant in law [that is, without written warrant], attached and imprisoned by the law of the land.¹⁵⁸

This statement indicated that when the victim of a robbery or other felony raised the "hue and cry"—that is, cried out that a felony was committed—anyone in fresh pursuit of the person the victim identified or described could arrest that person and the arrest was valid provided only that "[a] felony is done."¹⁵⁹ Note that this was an exception to the usual requirement that the arresting person personally suspect the arrestee of the felony. The obvious reason for this exception, as well as for the "hue and cry" procedure itself, was the need to arrest a felon promptly, lest he escape.¹⁶⁰

¹⁵⁶ The term "action" was a term of art that referred to a civil lawsuit for damages. See *supra* note 135.

¹⁵⁷ 2 COKE, *supra* note 13, at 52.

¹⁵⁸ 2 *id.* at 52. Coke also stated, in a slightly earlier passage on warrantless arrest authority: "So it is of hue and cry, and that is by the statue of Winchester, which is but an affirmance of the common law . . ." 2 *id.*

¹⁵⁹ Later commentators clarified that in a hue and cry arrest persons who acted in response to the "hue and cry" were not liable for trespass even if there had been no felony. See, e.g., 2 RICHARD BURN, JUSTICE OF THE PEACE AND PARISH OFFICER 438 (1770 edition). This leading four-volume justice of the peace manual was first published in 1755 and republished in numerous later editions during the eighteenth century. See 1 MAXWELL, *supra* note 13, at 225-26. All cites to this work in this article are to the 1770 edition unless otherwise noted.

¹⁶⁰ Initially the "hue and cry" statute actually imposed an obligation on those persons who were residents of a locale in which a felony occurred to catch and turn over the person who committed the felony; if the felon was not arrested, the residents were sub-

Another exception to the usual rule for warrantless arrest applied to night watchmen in towns: "A watchman may arrest a night walker by a warrant in law."¹⁶¹ This rule was set out in an early English statute that provided that towns should have a night watch and that persons found wandering at night were to be detained until they could be examined by a justice of the peace the next morning. In effect, being out after dark in town was so suspicious that it was grounds for a temporary arrest to determine if any felony had been committed in the night.¹⁶² Notably, Coke described the earlier statute that authorized this detention as being "in affirmation of the common law."¹⁶³

Another passage permitted a warrantless arrest of the confederate of a known thief:

If a man keep the company of a notorious thiefe; whereby he is suspected, &c. it is a good cause, and a warrant in law to arrest him.¹⁶⁴

At first blush, this may seem to allow a warrantless arrest merely because the arrestee had kept bad company, but I think a framing-era reader would have understood that there was more to it. To begin with, theft was a felony. Additionally, the ampersand in "whereby he is suspected, &c." is pregnant with implied meaning. Ampersands appear in historic texts where the rest of the meaning was thought to be too obvious to require the expenditure of ink. I think the "&c." connotes the usual requirement that a theft (a felony) had been "done" for which the "notorious thiefe" was a suspect. Thus, a confederate of the "notorious theife" would also be a suspect in the theft that had been committed.¹⁶⁵

The distinction between felonies and lesser offenses was an important factor in common-law arrests because common law

ject to fine. Notably, "hue and cry" was described as "the old common law *process* after felons." 2 BURN, *supra* note 159, at 434, 435 (emphasis added) (entry for "hue and cry").

¹⁶¹ 2 COKE, *supra* note 13, at 52.

¹⁶² See, e.g., Davies, *Arrest*, *supra* note 3, at 328-29.

¹⁶³ 2 COKE, *supra* note 13, at 51.

¹⁶⁴ 2 *id.* at 52.

¹⁶⁵ A late eighteenth-century treatise interpreted this passage along the same lines I have. See *infra* note 257.

permitted warrantless arrests on the basis of “necessity.”¹⁶⁶ Even mistaken warrantless arrests were permitted for felonies because the potential punishment for a felony (usually death) was so severe that a person who had committed a felony had a strong motivation to flee the vicinity, and if they were successful in leaving the vicinity it was unlikely they would be caught. Thus, in the case of felony, provision had to be made for immediate arrest.

In contrast, the punishment for a misdemeanor was less severe, so there was less likelihood that a misdemeanant would flee the vicinity. Hence, because there was no necessity for an immediate arrest, warrantless misdemeanor arrests were usually restricted to situations in which an ongoing offense amounting to a breach of the peace was being committed in the presence of the arresting person.¹⁶⁷ Thus, in keeping with the general common-law principle that no arrest authority existed unless it was affirmatively recognized in the law, Coke indirectly invoked the usual rule that a misdemeanor arrest required a judicial warrant by identifying the specific situations in which a warrantless misdemeanor arrest was permitted. One such exception involved a specific rule regarding a “dangerous wounding”:

If a man woundeth another dangerously, any man may arrest him by a warrant in law [that is, without a written warrant], until it may be known, whether the party wounded shall die thereof, or no.¹⁶⁸

This passage implicitly rests on the different rules for felony or misdemeanor arrests. If there was only a wounding, but not an actual homicide—that is, what we would term an aggravated assault or an attempted murder—that would not have

¹⁶⁶ See Davies, *Arrest*, *supra* note 3, at 319-26.

¹⁶⁷ See *id.* at 321-26. It does not appear that Coke objected to a justice of the peace issuing a pre-indictment arrest warrant for a misdemeanor, because he seems to have taken it as a given that a misdemeanor arrest warrant would not justify “breaking” a house to make an arrest. See *infra* notes 188, 192.

¹⁶⁸ 2 COKE, *supra* note 13, at 52. An arrest by “warrant in law” was a warrantless arrest. See *supra* text accompanying notes 141-42.

constituted a felony at common law;¹⁶⁹ hence, a lawful arrest could be made only pursuant to a judicial arrest warrant. However, because murder and voluntary manslaughter were felonies, if the wounded person died a warrantless arrest would be lawful.¹⁷⁰ The difficulty, in the immediate aftermath of an attack, was determining whether the victim would die. Thus, the common law provided a specific rule for a “dangerous wounding” that permitted at least a temporary warrantless arrest to determine whether or not there was a felony.¹⁷¹

The other rule that Coke mentioned regarding non-felony warrantless arrests pertained to an “affray” that constituted a “breach of the peace”—that is, a fight that occurred in public sight or hearing:

If an affray be made to the breach of the kings peace, any man may by a warrant in law [that is, without a written warrant], restrain any of the offenders, to the end the kings peace may be kept, but after the affray ended, they cannot be arrested without an expresse [that is, written] warrant.¹⁷²

This passage implicitly rests on the basic common-law rule that a warrantless arrest for a crime less than a felony could be made only if (1) the crime amounted to a “breach of the peace” (that is, an offense that would put the public in fear of disorder¹⁷³) and (2) the arrest was made *during* the commission of the breach by a person who personally witnessed the offense being committed.¹⁷⁴ As long as a breach of the peace was ongoing, there was an immediate need to restore order; however, that need ended when the affray ended. Thus, a warrantless

¹⁶⁹ See *supra* note 150 (noting that attempted felonies were only misdemeanors).

¹⁷⁰ See 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 176-204 (discussing homicide).

¹⁷¹ The dangerous wounding rule is an example of an exception to the usual rule based on “necessity.” See *id.* at 320-21.

¹⁷² 2 COKE, *supra* note 13, at 52. In this passage an arrest by “a warrant in law” refers to what we call a warrantless arrest, while an arrest by “an expresse warrant” would be a warrant arrest. See *supra* notes 141-42 and accompanying text.

¹⁷³ See Davies, *Arrest*, *supra* note 3, at 284-87.

¹⁷⁴ See *id.* at 323-24. This prohibition against warrantless misdemeanor arrests except when the offense was committed in the officer’s presence was still a basic tenet of arrest law during the framing era and even as late as the Supreme Court’s analysis in the 1925 ruling in *Carroll v. United States*, 267 U.S. 132. See *infra* note 223.

arrest could not be made after a breach of the peace had ended; in that instance, a judicial warrant was required.¹⁷⁵

Taken together, Coke's statements actually constituted a fairly complete, if sometimes cryptic, summary of the common-law justifications for felony and less-than-felony warrantless arrests. Moreover, as I discuss below, these same rules were still repeated with virtually no change of substance in the criminal procedure treatises and manuals used in framing-era America. Thus, *these passages in Coke's explication of Magna Carta 29 effectively rooted the common-law doctrines that governed warrantless arrest during the framing era in Magna Carta's "law of the land" guarantee.*

Following these passages on warrantless arrest, Coke addressed commitment of an arrestee to prison to await trial. In that context, Coke wrote that the principle that "no man can be taken, arrested, attached, or imprisoned but by due processe of law" also meant that certain requisites had to be met in committing an arrestee to prison to await trial. In particular, "due processe of law" meant that the offense for which a person was committed to await trial had to be specified so that the lawfulness of the arrest could be tested in a habeas corpus proceeding.¹⁷⁶

Coke then concluded the discussion of arrest and imprisonment in his chapter on Magna Carta 29 with a discussion of the writ of habeas corpus as a remedy for unlawful arrest and imprisonment, and set out forms for writs of habeas corpus.¹⁷⁷ In the course of this latter discussion, he revisited the most basic principle of arrest and imprisonment that had been addressed in the Petition of Right—that an arrest had to be based on a charge of a specific and recognized crime. Indeed, he rooted that principle in the Biblical account of the trial of the Apostle Paul:

¹⁷⁵ See Davies, *Arrest*, *supra* note 3, at 324 n.253.

¹⁷⁶ 2 COKE, *supra* note 13, at 52 (citing the Marian committal statutes and stating that a warrant or mittimus of commitment to jail to await trial must be in writing, state the cause for the imprisonment, and have a "lawful conclusion" that the person be held until "delivered by law").

¹⁷⁷ 2 *id.* at 52-53.

By these writs [of habeas corpus] it manifestly appeareth, that no man ought to be imprisoned, but for some certain cause: and these words, *ad subjiciend. et recipiend. &c.* [appearing in the forms for writs of habeas corpus] prove that cause must be shewed: for otherwise how can the court [hearing the habeas corpus proceeding] take order therein according to law?

And this doth agree with that which is said in the holy history, [It seems to me without reason to put a convicted person in prison and not to signify the causes thereof.]. But since we wrote these things, and passed over to many other acts of parliament; see now the petition of right, [1628], resolved in full parliament by the king, the lords spirituall, and temporall, and the commons, which hath made an end of this question, if any were.¹⁷⁸

Thus, Coke construed the Petition of Right as a reiteration of the principles of Magna Carta 29 and treated both of those documents as demanding compliance with common-law arrest standards. In a later passage, Coke also reiterated, “[n]o man to be arrested, or imprisoned contrary to the forme of the great charter.”¹⁷⁹

3. Coke’s Discussion of Search and Arrest Warrants

Although Coke wrote little about written arrest or search warrants (“warrants in deed”) in his chapter on Magna Carta 29 itself, he discussed that topic in more detail in the fourth volume of his *Institutes* in the chapter on the authority of a justice of the peace—the judicial officer who typically issued such war-

¹⁷⁸ 2 *id.* at 53 (citing “Act Apost. Ca. 25. ver. ult.”). The Latin passage translated in the brackets was: “*Sine ratione mihi videtur, mittere vinctum in carcerem, et causas ejus non significare.*” The translation in the brackets is from 2 COKE’S WRITINGS, *supra* note 149, at 864 n.95. The Book of Acts attributed this statement to the Roman Governor Festus during the trial of the Apostle Paul. Blackstone later paraphrased the same passage when he noted that Coke had asserted, “like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.” 1 BLACKSTONE (1st ed. 1765), *supra* note 135, at 133.

Coke also asserted that arrests without charge were “against reason” during the debate in the House of Commons preceding the adoption of the Petition of Right. See Davies, *supra* note 2, at 688-89 n.397.

¹⁷⁹ 2 COKE, *supra* note 13, at 54.

rants.¹⁸⁰ Because that office comprised the most numerous judicial office in America as well as in England, it is likely that Americans were also familiar with this chapter.

Three aspects of Coke's discussion of warrants are particularly noteworthy. First, Coke again tied the standards for warrants, and the rules regarding when warrants were required, to Magna Carta 29 when he stated, "for [a] justice[] of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stol[e]n goods, is against Magna Carta."¹⁸¹ In particular, Coke called attention to the language in Magna Carta 29, "*Nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terrae*" ["nor will we not pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land"].¹⁸² (The phrase that Coke translated as "nor will we not pass upon him" is sometimes translated as "nor will we go upon him."¹⁸³)

Second, Coke indicated that only a judicial arrest warrant for felony or a search warrant for "stol[e]n goods" (also a felony) could justify "breaking" a house (that is, entering except by an already open door), but stated that a writ for a civil lawsuit for debt or trespass could not justify "the sherif or any other" to break a house.¹⁸⁴ (Coke also set out this rule in his report of *Semayne's Case*.¹⁸⁵) The only exception Coke noted to this warrant requirement was that a house could be broken when an officer was in fresh pursuit of a felon under "hue and cry"—if, that is, the occupants refused to allow entry.¹⁸⁶ These passages

¹⁸⁰ 4 *id.* at 176-77 (discussing authority of justices of the peace to issue warrants).

¹⁸¹ 4 *id.* at 177 (citing "Mag. Cart. c. 29" in the margin).

¹⁸² 4 *id.*

¹⁸³ See, e.g., SOURCES, *supra* note 104, at 17 (translating the "law of the land" chapter of Magna Carta, but referring to it as chapter 39 rather than 29; see *supra* note 108 and accompanying text).

¹⁸⁴ 4 COKE, *supra* note 13, at 177.

¹⁸⁵ 5 Coke. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604); see also Davies, *supra* note 2, at 643 n.264.

¹⁸⁶ 4 COKE, *supra* note 13, at 177 ("upon hue and cry of one that is slain or wounded, so as he is in danger of death, or robbed, the kings officer that pursueth may (if denyall be made [to open the door]) break a house to apprehend the delinquent"). It should be noted that the common-law knock and announce rule was not as flexible as the purport-

invoked the importance the common law assigned to the security of the house—what James Otis would later call “[t]he Privilege of House” during the 1761 arguments in the Boston *Writs of Assistance Case*.¹⁸⁷ Thus, Coke effectively presented the requirement of a warrant to justify breaking a house as a component of “the law of the land” in Magna Carta 29.

The third aspect of Coke’s discussion is that he took a very restrictive view of when justices of the peace could issue felony arrest or search warrants. In particular, he asserted that a justice of the peace was not authorized to issue a search warrant for “stol[e]n goods” unless the accused person had already been indicted, because it was not the place of a justice of the peace to issue a warrant upon mere “surmises” or “suggestions.”¹⁸⁸

Along the same lines, Coke asserted that justices of the peace had not been empowered at common law to issue felony arrest warrants before indictment,¹⁸⁹ but he recognized that the

edly originalist rule announced in *Wilson v. Arkansas*, 514 U.S. 927, 932-33 (1995). See Davies, *supra* note 2, at 742 n.561.

¹⁸⁷ See 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 50, at 125-26 (reprinting Adams’s notes of the arguments in the 1761 *Writs of Assistance Case*). See also Davies, *supra* note 2, at 642-50 (discussing historical sources indicating that the privilege of the house at common law effectively made a felony warrant a requirement for a house search).

¹⁸⁸ For example, Coke wrote:

One or more justice or justices of peace cannot make a warrant upon a bare surmise to break any mans house to search for a felon, or for stolen goods, for they being created by act of parliament have no such authority granted unto them by any act of parliament: and it should be full of inconvenience, that it should be in the power of any justice of peace being a judge of record upon a bare suggestion to break the house of any person of what state, quality, or degree soever, and at what time soever, either in the day or night upon such surmises. But if the party suspected be indicted, then the sherif by force of the kings writ may demand the party indicted to be delivered; and that not done, he may break open the house, &c. and apprehend the felon, for that the kings writ is a *Non omittas propter aliquam libertatem* [that is, that the thing commanded is not to be omitted] . . . And yet it is to be understood, that if one be indicted of felony, the sherif may by processe thereupon after denyall made, &c. break the house for his apprehension.

4 COKE, *supra* note 13, at 176-77.

¹⁸⁹ Coke stated that prior to the Marian statutes (which were enacted in the mid-sixteenth century during the reign of Mary Tudor):

this warrant to take a felon should be in the nature of a *capias* for felony, which cannot be granted before indictment, nor after indictment, but in open court. And this is the reason wherefore justices of peace before indictment could not have let any charged with felony or suspicion [of felony] to bail, or

Marian committal and bail statutes, enacted in the mid-sixteenth century, had altered that practice.¹⁹⁰ Even so, Coke took a narrow view of the nature of the pre-indictment arrest warrants that could be issued even under Marian practice; specifically, he described the warrant that could be issued regarding a felony arrest as a command to a constable to keep the peace while the complainant actually made the arrest, rather than as a command to the constable to make the arrest.¹⁹¹ Similarly, Coke insisted that only a post-indictment felony arrest warrant, but not a pre-indictment warrant, could justify breaking a house.¹⁹²

mainprise, because justices of peace are judges of record, and ought to proceed upon record, and not upon surmises.

4 *id.* at 177. A *capias* is a form of arrest warrant.

¹⁹⁰ For a brief description of the Marian committal statutes and procedure, see Davies, *Crawford*, *supra* note 19, at 127-29.

¹⁹¹ Coke conceded that the Marian statutes had changed that rule by writing, “[s]ed *distinguenda sunt tempora, et concordabis leges*; for since the [enactment of the Marian statutes] . . . “ 4 COKE, *supra* note 13, at 177. The Latin translates as “but times (or circumstances) must be distinguished, and the laws brought into agreement.” Thus, Coke seems to have acknowledged a statutory alteration of the earlier common law regarding arrest warrants:

since the statutes of 1 & 2 Ph. & Mar. cap. 13. and 2 & 3 Ph. & Mar. cap. 10 (the words whereof be, that the said justices, or one of them being of the quorum, when any such prisoner is brought before them for any manslaughter, or felony, shall take examination, &c.) if any person be charged with any manner of felony or suspicion of felony, and feareth that the kings peace may be broken in apprehending of him, the said justice may make a warrant to the constable of the town to see the kings peace kept in the apprehending and bringing of the party charged with or suspected of the felony before him, and the party that giveth the information of his knowledge or suspicion to be present and arrest the delinquent; and in this manner it is implied and intended by the said [Marian] statutes for the prisoner to be brought before them : and this (as we take it) agreeth with the common use and observance ever since those statutes. And this agreeth also with the said book in 14 H. 8. that a justice of peace may make his warrant for the salvation of the peace, meaning to assist the party that knoweth or hath suspicion of the felony. But in this case neither the constable, nor any other can break open any house for the apprehension of the party suspected or charged with the felony, for it is in law the arrest of the party that hath the knowledge or suspicion, who cannot break open any house: but if the door of the house be open, he may enter into the same, and arrest the party.

4 *id.* at 177-78 (footnotes omitted).

¹⁹² However, even after recognizing that the Marian statutes had brought about a change, Coke still wrote:

Coke based his view of the limited authority for a justice of the peace to issue warrants on three points. First, Coke asserted that the statutes that created the office of justice of the peace had not conferred such authority.¹⁹³ Second, he asserted that a justice of the peace constituted a court of record and thus could not act on mere “surmises” or “suggestions” (an indictment constituted a “record,” but testimony by a complainant seeking an arrest or search warrant did not); thus, a justice of the peace lacked authority to issue a warrant until presented with an indictment.¹⁹⁴ Third, Coke based his restrictive view of warrants on the basic rule that arrests could be made only by a person who personally had knowledge of the crime and “suspected” the arrestee; thus although a justice of the peace could arrest on the basis of his own personal knowledge of a crime, he could not issue a warrant on the basis of another person’s allegations because that did not constitute his own “suspition.”¹⁹⁵

Of course, it seems likely that Coke’s very restrictive approach to warrants reflected a continuing concern with the sort of abusive arrests that had prompted the Petition of Right. It appears that the arrests that had been at issue at that time had typically been made under some kind of royal “writ” or warrant. Hence, Coke took some pains to restrict arrest warrants.¹⁹⁶

a justice of peace may make his warrant for the salvation of the peace, meaning to assist the party that knoweth or hath suspition of the felony. But in this case neither the constable, nor any other can break open any house for the apprehension of the party suspected or charged with the felony, for it is in the law the arrest of the party that hath the knowledge or suspition, who cannot break open any house : but if the door of the house be open, he may enter into the same, and arrest the party.

4 *id.* at 177-78 (footnotes omitted).

¹⁹³ 4 *id.* at 176-77.

¹⁹⁴ 4 *id.* at 177 (stating that “justices of peace are judges of record, and ought to proceed upon record, and not upon surmises”).

¹⁹⁵ 4 *id.* at 176 (stating that “the justice himself cannot arrest one for felony, unlesse he himself suspect him, (as any other may) and by the same reason he cannot make a warrant to another”).

¹⁹⁶ It may be significant that Coke pointed out that warrants could be used against the gentry as well as against the poor:

For though commonly the houses or cottages of poore and base people be by such warrants searched, &c. yet if it be lawfull, the houses of any subject, be he never so great, may be searched, &c. by such warrant upon bare surmises.

4 *id.* at 178.

(However, as I discuss below, Coke's narrow view of the authority of justices of the peace to issue arrest and search warrants was later rejected, in part, because later commentators viewed the oath of the complaint as being sufficient to bestow "suspicion" on the justice who heard the oath of the complainant.¹⁹⁷)

4. Summary of Coke's Rendition of Arrest Authority

In summary, passages in Coke's *Institutes* described the common-law standards for warrantless felony arrests, the general rule that a warrant was usually required for less-than-felony arrests, and the principle that warrants were usually required to "break" a house in the case of felony (and that houses could not be broken for less-than-felony offences). Moreover, Coke had portrayed those common-law rules *as being part of the content of Magna Carta 29's command* that no freeman be "taken" or "imprisoned" except by "the law of the land" or "due processe of law."¹⁹⁸

However, it is important to note that Coke had not actually treated "law of the land" and "due process of law" as complete synonyms. Rather, Coke used the latter term as a more specific term of art that referred primarily to the requirement of grand jury indictment, but that also included "process of law" in the form of arrest warrants and even included arrest authority by "warrant in law without writ"—that is, authority for warrantless arrest.¹⁹⁹ Thus, "due process of law" had a more focused meaning than "the law of the land."

5. What Coke Did Not Treat as "Due Process of Law"—Trial Procedure

It is also important to recognize what Coke did *not* discuss under the labels of "the law of the land" or, particularly, "due

¹⁹⁷ See *infra* text accompanying note 229.

¹⁹⁸ See, e.g., 2 COKE, *supra* note 13, at 187 (stating that "regularly no man ought to be attached by his body, but either by proces of law that is, (as hath beene said) by the kings writs, or by indictment, or lawfull warrant, as by many acts of parliament is manifestly enacted and declared, which are but expositions of *Magna Charta*").

¹⁹⁹ See *supra* notes 141-42 and accompanying text (including "warrant in law without writ" as a form of "process of law").

process of law.” Most notably, he did *not* apply the term “due process of law” to criminal trial procedure. In common-law legal terminology, trial procedure was typically referred to as “course of law,”²⁰⁰ not as “process.” The term “process” was usually reserved for various forms of written authority such as writs, warrants, or indictments. Coke’s discussion adhered to that specific understanding of “process”—in fact, he wrote very little about ordinary criminal jury trial procedure in his rendition of the “law of the land” chapter of Magna Carta.

Magna Carta 29 had stated that no person was to be arrested or punished “but by lawful judgment of his peers, *or* by the law of the land,”²⁰¹ and later commentators would treat the “lawful judgment of his peers” as though it were a reference to a trial by a jury of one’s equals.²⁰² However, that is not how Coke used that term. Rather, he treated the “lawful judgment of his peers” to refer, literally, to right of the “peers” of the realm (that is, nobles) to be tried in the court of the king’s steward rather

²⁰⁰ Common-law authorities routinely referred to the requirement of conformity with court and trial procedure as “due *course* of law,” rather than “due process of law.” For example, the mittimus forms (that is, the forms for a warrant committing a person to jail to await trial) typically ordered the jailer to hold the arrestee until he was delivered by “due course of law” or sometimes “due order of law.” For examples, see Davies, *Arrest*, *supra* note 3, at 395 n.521. The phrase “due course of law” also appears in discussions of trial verdicts.

This usage of “course” as opposed to “process” is also evident in several of the American provisions discussed below. For example, the 1776 Maryland Declaration of Rights stated that the inhabitants of that state were “entitled to the common law of England, and the trial by jury, according to the *course* of that law.” See 4 STATE CONSTITUTIONS, *supra* note 62, at 372 (art. III) (emphasis added). Similarly, the 1777 New York Constitution provided that any new courts were to be “such as shall proceed according to the *course* of the common law.” See 7 *id.* at 179 (art. XLI) (emphasis added). Although the 1787 New York Bill of Rights used “due Process of Law” in the criminal procedure provision that addressed arrests (that is, a person being “taken”), see *infra* text accompanying note 396, it shifted to “*due Course of Law*” when it referred to the requisites for a valid conviction, see *infra* text accompanying note 399 (emphasis added). Additionally, the 1787 Northwest Ordinance guaranteed that citizens of that territory would enjoy “judicial proceedings according to the *course* of the common law” as well as the protections of the “law of the land.” See *infra* note 474 (emphasis added).

²⁰¹ See *supra* text accompanying note 109 (emphasis added).

²⁰² For example, in 1765, Blackstone construed the “lawful judgment of his peers” to be equivalent to “the lawful judgment of his equals.” See the passage quoted *infra* note 214.

than “by an ordinary jury of twelve men,” and discussed the levels of nobility that were entitled to be treated as peers.²⁰³

Thus, Coke treated the “or” between “the lawful judgment of his peers *or* the law of the land” in Magna Carta 29 as a disjunctive that distinguished between different aspects of criminal procedure. In particular, Coke never used the term “due process” at all in discussing the trial rights of nobles denoted under “the lawful judgment of his peers,” and used “law of the land” in that discussion only once, saying that “[i]f a noble man be indicted, and cannot be found, proces of outlawrie shall be awarded against him *per legem terrae* [by the law of the land] . . . but he shall be tried *per judicium parium suorum* [by the judgment of his peers], when he appeares and pleads to issue.”²⁰⁴ Even in that passage, “law of the land” pertains to the pretrial process of outlawry, not to trial proceedings, as such.²⁰⁵

Additionally, Coke had little or nothing to say about a variety of the other criminal procedure rights that would later be included in the American declarations of rights. He wrote little about a right against self-accusation or about a prohibition against double-jeopardy. The reason is that those rights were developed by English judges largely after Coke’s time.

The struggle against royal abuses of criminal justice powers did not end with the Petition of Right of 1628. Like his predecessors, Charles I ignored the guarantees in the Petition, and his officers then used other abusive criminal procedures against

²⁰³ 2 COKE, *supra* note 13, at 48-50. Coke discussed “by lawful judgment of his peers” under two headings. Under the heading “(6) *Per judicium parium suorum*,” Coke discussed the general right of peers to be tried in the court of the king’s steward, but noted exceptions; for example, in instances when an appeal (a private prosecution, rather than a prosecution in the king’s name) was brought against a peer, the peer was subject to an ordinary criminal trial. 2 *id.* at 48-49. Under the heading “(7) *Per legale judicium*,” Coke discussed various aspects of procedure in the court of the king’s steward. 2 *id.* at 49.

²⁰⁴ 2 *id.* at 49.

²⁰⁵ Remarkably, post-framing commentators such as Justice Story would later treat “due process of law” as though that term merely referred to the right to jury trial. See *infra* notes 563-64 and accompanying text. However, that was such a complete distortion of Coke’s explication that it is difficult to see how anyone who actually read Coke could have come to that conclusion. The phrase “judgment of his peers” was treated as a reference to jury trials during the eighteenth century, but that was not the case with “due process of law.”

his political opponents.²⁰⁶ For example, they used the “oath *ex officio*” in the prerogative Court of Star Chamber and in the ecclesiastical Court of High Commission to trap political opponents into making heretical or seditious statements that could be used as a basis for a criminal prosecution.²⁰⁷ Parliament responded to that and related abuses by abolishing the Courts of Star Chamber and High Commission in 1641.²⁰⁸ Subsequently, however, there were further deprivations of criminal procedure rights during the English Civil War and Cromwellian Commonwealth. Likewise, after the Stuart monarchy was restored in 1660, Charles II and James II again engaged in arbitrary imprisonments and a variety of stratagems to blunt the remedy of habeas corpus. For example, they took to keeping prisoners on Channel Islands that were not technically part of England and thus were beyond the writs of habeas corpus issued by the common-law courts at Westminster.²⁰⁹ Parliament responded by strengthening the habeas corpus remedy in the Habeas Corpus Act of 1679,²¹⁰ and—following the Glorious Revolution of 1688 that deposed the Stuarts and installed William and Mary—further strengthened that remedy by including a protection against excessive bail in the English Bill of Rights of 1689²¹¹ (a provision that would later be copied in a number of American state declarations of rights as well as in the Federal Eighth Amendment²¹²), and Parliament also included further reforms of habeas corpus in the Treason Act of 1696 (which also made reforms regarding the law and evidence of treason that were later incorporated in the Treason Clause in Article III of the Constitution).²¹³

There is no doubt that the American Framers were conversant with this entire line of abuses and reforms, starting with the invocation of Magna Carta 29 in the Petition of Right. Those abuses and reforms constituted the Whig canon and were

²⁰⁶ See, e.g., SOURCES, *supra* note 104, at 70, 130-31.

²⁰⁷ *Id.* at 132-33.

²⁰⁸ *Id.* at 125-42.

²⁰⁹ *Id.* at 193 & n.20.

²¹⁰ *Id.* at 189-203.

²¹¹ *Id.* at 235-36, 247 (sec. 10); see generally *id.* at 222-50.

²¹² See *infra* notes 296-97, 455, and accompanying text.

²¹³ See SOURCES, *supra* note 104, at 240-41.

described by numerous later commentators. For example, Blackstone discussed the full sequence of those constitutional reforms in his discussion of the absolute right, inherent in every Englishman, to personal liberty.²¹⁴

Moreover, after the Glorious Revolution of 1688, the Cokean claim of immemorial rights was reinforced by Lockean social contract theory under which each individual gave up natural liberty only to the extent “necessary” for mutual security. The American Framers James Wilson expressed that understanding in his 1790-1791 law lectures:

²¹⁴ See 1 BLACKSTONE (1st ed. 1765), *supra* note 135, at 130-31 (footnotes omitted):

This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may [observe] that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter [i.e., Magna Carta] is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king, or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. By 16 Car. I c. 10. if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II c. 2. commonly called *the habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that . . . no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. [i.e., the English Bill of Rights] st. 2. c. 2. that excessive bail ought not to be required.

See also 1 BLACKSTONE (1st ed. 1765), *supra* note 135, at 123-25; 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 416-17, 429-33. Blackstone also stated that “the preservation of this personal liberty” was “[o]f great importance to the public” because arbitrary arrests were “a more dangerous engine of arbitrary government” than even “unjust attacks, even upon life or property, at the arbitrary will of the magistrate.” 1 BLACKSTONE (1st ed. 1765), *supra* note 135, at 131-32. Blackstone also referred to the Habeas Corpus Act as “that second *magna carta*.” See *id.* at 133. See also 3 BLACKSTONE (1st ed. 1768), *supra* note 135, at 135 (describing the Habeas Corpus Act as “another *magna carta*”).

Every wanton, or causeless, or unnecessary act of authority, exerted, or authorized, or encouraged by the legislature over the citizens, is wrong, and unjustifiable, and tyrannical: for every citizen is, of right, entitled to liberty, personal as well as mental, in the highest possible degree, which can consist with the safety and welfare of the state. [We are servants of the law so that we can be free].²¹⁵

This notion that only "necessary" constraints were lawful carried over to arrest doctrine. Thus, Blackstone described warrantless arrest authority as arising from "some other special cause warranted, for the necessity of the thing, either by common law, or act of parliament."²¹⁶ In keeping with this outlook, framing-era common-law authorities continued to state the same strict standards for warrantless arrest that Coke had described in his rendition of "the law of the land" and "due process of law" in Magna Carta 29.

D. The Continuity of Common-Law Arrest Doctrine

During the framing era, Americans drew their understanding of common-law criminal procedure primarily from the leading treatises—especially Sergeant William Hawkins's *A Treatise of the Pleas of the Crown*²¹⁷ and Sir Matthew Hale's *The History*

²¹⁵ 2 THE WORKS OF JAMES WILSON 649 (Robert McCloskey ed., 1967) (bracketed sentence translated from Latin). Blackstone expressed the same principle:

But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase ; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. . . . Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind : but every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. . . . [T]hat constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

¹ BLACKSTONE (1st ed. 1765), *supra* note 135, at 121-22.

²¹⁶ 3 BLACKSTONE (1st ed. 1768), *supra* note 135, at 127.

²¹⁷ WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (London, 2 volumes: volume 1 published 1716; volume 2 published 1721). Additional editions that were virtually identical to the first edition were published in 1724-1726, 1739, and 1771. See 1 MAXWELL, *supra* note 13, at 362-63. For simplicity, I cite only the 1771 edition. The

of the *Pleas of the Crown*²¹⁸—as well as from a variety of derivative works, including especially justice of the peace manuals. The leading English manual was Richard Burn's *Justice of the Peace and Parish Officer*,²¹⁹ and the manuals printed in framing-era America borrowed heavily from it.²²⁰ The discussions of arrest authority in these framing-era treatises and manuals were sufficiently similar to the common-law arrest doctrines that Coke had assigned to Magna Carta 29 that framing-era Americans would have perceived those doctrines to be settled and virtually permanent.

1. Warrantless Arrest Standards

In particular, the framing-era authorities continued to restrict warrantless misdemeanor arrests to on-going breaches of the peace committed in view of the arresting person—an espe-

title "Serjeant" indicated that Hawkins was a senior barrister in the London courts. The various editions of Hawkins's treatise were widely imported by Americans. See Davies, *Hearsay*, *supra* note 3, at 427 & n.194.

In 1787, Thomas Leach edited a two-volume edition of Hawkins's treatise to which he added substantial notes and some new textual material; that edition was reprinted in Dublin in 1788 and most of the surviving copies of that edition in American libraries are of the 1788 Dublin reprinting. For clarity, I cite the Dublin printing of this edition separately: WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (Thomas Leach ed., Dublin, Eliz. Lynch 6th ed. 1788) [hereinafter LEACH'S HAWKINS].

²¹⁸ MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN (Sollom Emlyn ed., Savoy, E. & R. Nutt & R. Gosling 1736) (written prior to Hale's death in 1675 but published only posthumously). Subsequent editions that were virtually identical to the first were published in 1778 and 1800. See 1 MAXWELL, *supra* note 13, at 362. Hale was a judge of the superior courts in London. Note that Hale's treatise was written before that by Hawkins, but published later.

²¹⁹ BURN, *supra* note 159.

²²⁰ Four substantial justice of the peace manuals were published in America between 1765 and 1788, and each drew heavily on Burn's English manual. The earliest of these was CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE (Woodbridge N.J. 1764; printed by James Parker, "[o]ne of his Majesty's Justices of the Peace for Middlesex County, in New Jersey"). This manual was also reprinted in two 1788 printings in New York: THE CONDUCTOR GENERALIS (New York, 1788; printed by Hugh Gaine) [hereinafter GAINES'S CONDUCTOR]; CONDUCTOR GENERALIS (New York, 1788; printed by John Patterson for Robert Hodge) [hereinafter HODGE'S CONDUCTOR]. The three other prominent manuals were: AN ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER (Boston, 1773; printed by Joseph Greenleaf); RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE (Williamsburg, 1774; printed by Alexander Purdie & John Dixon); and THE SOUTH-CAROLINA JUSTICE OF PEACE (Philadelphia, R. Aitken & Son 1788) (published anonymously but attributed to Judge John Fauchereaud Grimke; see Davies, *Crawford*, *supra* note 19, at 185 n.256).

cially important restriction because many serious crimes were still classified as non-felonies.²²¹ Additionally, the framing-era authorities continued to limit warrantless felony arrests to instances in which (1) a felony was actually committed, and (2) the arresting person personally had cause to suspect the arrestee of the felony. Thus, warrantless arrests continued to be limited to instances in which the necessity criterion was met.

For example, Burn's discussion of warrantless arrest authority largely tracked Coke's earlier discussion. Burn stated that warrantless arrests for felony could be based on various forms of strong or probable "suspicion" that the person had committed the crime, but noted that no such arrest could be lawful unless "such crime hath been committed."²²² Also like

²²¹ See *supra* note 150 and accompanying text.

²²² 1 BURN, *supra* note 159, at 95. Burn stated the following:

And the causes of suspicion, which are generally agreed to justify the arrest of an innocent person for felony, are these that follow :

(1) The common fame of the country ; but it seems, that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground. 2 *Haw.* 76.

(2) The being found in such circumstances, as induce a strong presumption of guilt ; as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand ; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. 2 *Haw.* 76.

(3) The behaving one's self in such a manner as betrays a consciousness of guilt ; as where a man accused of felony, on hearing that a warrant is taken out against him, doth abscond. 2 *Haw.* 76.

(4) The being found in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. 2 *Haw.* 76. 2 *Inst.* 52.

(5) The living an idle, vagrant, and disorderly life, without having any visible means to support it. 2 *Haw.* 76.

(6) The being pursued by hue and cry. 2 *Haw.* 76.

For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted ; he may be attached and imprisoned by the law of the land. 2 *Inst.* 52.

But generally, no such cause of suspicion, as any of the above mentioned, will justify an arrest, where in truth no such crime hath been committed ; unless it be in the case of hue and cry. 2 *Haw.* 76.

1 BURN, *supra* note 159, at 95 (citations to "*Haw.*" are to Hawkins's treatise; those to "*Inst.*" are to Coke's *Institutes*). Compare to Coke's statements quoted *supra* notes 149-64 and accompanying text.

Coke, Burn conveyed the limited scope of warrantless arrest authority for misdemeanors by stating only those instances in which such arrests were permitted; namely, a dangerous wounding or an on-going affray in the presence of the arresting officer.²²³

The framing-era authorities also continued to reiterate the rule that a warrantless arrest could be made only by a person who personally had grounds to suspect that the arrestee was the person who was guilty of the felony that had been committed. For example, Hawkins wrote that

the Law hath so tender a Regard to the Liberty and Reputation of every Person, That no Causes of Suspicion whatsoever, let the Number and Probability of them be ever so great, will justify the [warrantless] Arrest of an innocent Man, by one

²²³ Burn wrote the following regarding warrantless arrest in “criminal cases”—note that the specific entries distinguish between felony and less-than-felony criminal offenses and that items four and five deal with misdemeanors amounting to on-going breaches of the peace:

1. In criminal cases, a person may be apprehended and restrained of his liberty, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept.

2. Thus all persons, who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect. 2 *Haw.* 74.

....

3. Also, a watchman may arrest a night walker, without any warrant from a magistrate. 2 *Inst.* 52.

4. In like manner, a constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice. 1 *H.H.* 587.

5. Or any person whatsoever, if an affray be made to the breach of the king's peace, may without any warrant from a magistrate, restrain any of the offenders, to the end the king's peace may be kept; but after the affray is ended, they cannot be arrested without an express warrant. 2 *Inst.* 52.

6. So much concerning an arrest without warrant . . .

1 BURN, *supra* note 159, at 95-96 (citations to “*Haw.*” are to Hawkins’s treatise, “*H.H.*” are to Hale’s treatise, and “*Inst.*” are to Coke’s *Institutes*). Compare to Coke’s statements about non-felony warrantless arrests set out *supra* notes 158-72 and accompanying text. For a more complete discussion of framing-era warrantless arrest authority for less-than-felony offenses, see Davies, *Arrest*, *supra* note 3, at 301-27. The restrictions on warrantless misdemeanor arrests have persisted in some American states. See *infra* note 576.

who is not himself induced by them to suspect him to be guilty, whether he make such Arrest of his own Head, or in Obedience to the Commands of a private Person, or even of a Constable.²²⁴

Indeed, it may be that this requirement of personal "suspicion" for warrantless arrests had taken on even more practical significance as the ban against hearsay evidence in criminal cases became more firmly established after Coke's time. In eighteenth-century doctrine, "hearsay" was defined to include any unsworn statement, and the settled rule was that "[h]earsay is no [e]vidence."²²⁵ The ban against hearsay evidence would appear to have meant that the person who initiated an arrest, including a constable, had to be prepared to justify the arrest by their own knowledge (or at least by presenting additional witnesses who could testify under oath as to their own knowledge), rather than by repeating information someone else had told them.²²⁶

Likewise, although an eighteenth-century constable possessed somewhat broader authority than a private person to arrest for some breaches of the peace other than affrays, the renditions of arrest law in the framing-era authorities still did not indicate that a peace officer possessed any broader authority to make a warrantless felony arrest than any private person possessed. Rather, as Hawkins put it, "as to the justifying of . . . Arrests by the Constable's own Authority ; it seems difficult to find any Case, wherein a Constable is impowered to arrest a Man for a Felony committed or attempted, in which a private Person might not as well be justified in doing it."²²⁷

2. Search Warrant and Arrest Warrant Standards

The framing-era authorities also reiterated much of Coke's discussion of arrest and search warrants. For example, both

²²⁴ 2 HAWKINS, *supra* note 217, at 76 (sec. 15) (footnote omitted); *see also* 2 LEACH'S HAWKINS, *supra* note 217, at 119-20.

²²⁵ *See, e.g.,* Davies, *Hearsay*, *supra* note 3, at 400-01, 407, 410.

²²⁶ *See generally id.*

²²⁷ 2 HAWKINS, *supra* note 217, at 80. This statement was unchanged in Thomas Leach's 1788 edition. *See* 2 LEACH'S HAWKINS, *supra* note 217, at 130.

Hawkins and Burn reiterated the need for a warrant “to break [a] man’s house” (that is, to enter through a closed door).²²⁸ However, there had been a significant expansion of the authority of justices of the peace to issue arrest or search warrants prior to indictment insofar as Hale and Hawkins had disagreed with Coke’s insistence that a justice could not issue pre-indictment search or arrest warrants.

As Burn noted, Hale had concluded that “though the original suspicion be not in himself, but in the party that prays his warrant,” the justices of the peace were “judges of the reasonableness of the suspicion” so “if they find the causes of suspicion to be reasonable, it is now become the justice’s suspicion as well as [the complainant’s].”²²⁹ Notably, Hale’s rationale did not reflect a rejection of the requirement that an arrest had to be based on the arresting person’s own suspicion so much as it allowed the justice to absorb the complainant’s suspicion through the complainant’s sworn testimony, so that the warrant was issued on the basis of the justice’s own “suspicion.” Nevertheless, Coke’s resistance to pre-indictment criminal warrants had been rejected.²³⁰

However, although Hale and Hawkins differed with Coke insofar as they permitted justices of the peace to issue arrest warrants prior to an indictment, they did not challenge the requirement of a sworn charge of crime “in fact” for issuance of a *search* warrant—thus, a search warrant for stolen goods could be issued only if there was a sworn statement that a theft had occurred in fact.²³¹

²²⁸ 2 HAWKINS, *supra* note 217, at 86-87 (“CHAP. XIV. Where Doors may be broken in Order to make an Arrest”); 4 BURN, *supra* note 159, at 105 (entry for search warrant).

²²⁹ 4 BURN, *supra* note 159, at 329 (citing Coke’s *Institutes*, “4 INST. 177,” and Hale’s treatise “2 H. H. 107-10” and “2 H. H. 80”).

²³⁰ See 4 BURN, *supra* note 159, at 329-30.

²³¹ Burn still cited Coke to the effect that a search warrant could not be issued for stolen goods “upon a bare surmise.” 4 *id.* at 105 (citing “4 Inst. 177”). However, citing Hale, Burn wrote that justices of the peace could issue a search warrant for stolen goods “in the case of a complaint, and oath made, of goods stolen, and that the party suspects that goods are in such a house, and shews the cause of his suspicion.” 4 *id.* (citing “2 H. H. 113, 150”). The requirement of “oath made, of goods stolen” indicated a requirement of an oath that there had been a theft in fact.

Hale had written that:

Hale and Hawkins differed, however, as to the crime-in-fact requirement for a felony *arrest* warrant. Writing in the middle of the seventeenth century, Hale still wrote that an arrest warrant for felony required "information upon oath" by the complainant "that a felony was committed" as well as sufficient grounds of suspicion as to the identity of the felon.²³² However, Hawkins's later treatise, written in the early eighteenth century, asserted that "the better Opinion" was that a felony arrest warrant was valid "whether any Felony were in Truth committed or not"²³³ and that it "seems probable" that such a warrant

In case of a complaint and oath of goods stolen, and that [the complainant] suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found. . . .

2 HALE, *supra* note 218, at 113. Hale also wrote, in a chapter on warrants to search for stolen goods, that such warrants "are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do shew his reasons of such suspicion." 2 *id.* at 150-51.

Thomas Leach also repeated the requirements of an allegation of a theft in fact in his 1787 edition of Hawkins's treatise. 2 LEACH'S HAWKINS, *supra* note 217, at 135 n.6 (summarizing Lord Camden's earlier ruling in *Entick v. Carrington*, 11 St. Tr. (1776-1781 edition) 321 (C.P. 1765), to the effect that, for a search warrant, "[t]here must be a full charge upon oath of a theft committed").

However, it should be noted that Hale had made inconsistent statements as to whether doors to houses could be broken to execute search warrants for stolen goods. In one instance he said doors could not be broken. 2 HALE, *supra* note 218, at 114 (statement "3"). In a later passage, however, he stated that doors could be broken "if the stolen goods be in the house." If the stolen goods were not found, the officer who broke the door while executing the warrant was "excused" but the complainant who obtained the warrant was "punishable" (liable for trespass) because the lawfulness of the search depended on whether the goods were ultimately ("*in eventu*") found or not. 2 *id.* at 151.

Thomas Leach adopted Hale's second statement in his 1787 edition of Hawkins's treatise and noted that Lord Camden's ruling in *Entick* was consistent with Hale on this point because Camden reiterated that the complainant who sought the search warrant "must abide the event at his peril; for if the [stolen] goods are not found, HE is a trespasser; and the officer being an innocent person will be always be a ready and convenient witness against him." 2 LEACH'S HAWKINS, *supra* note 217, at 135 n.6 (citing "Vide [see] also 2 Hale 113, 151.").

²³² 1 HALE, *supra* note 218, at 582.

²³³ 2 HAWKINS, *supra* note 217, at 82. The passage reads:

Sect 11. Yet perhaps it is the better Opinion at this Day, That any Constable, or even Private Person to whom a Warrant shall be directed from a Justice of Peace to arrest a particular Person for Felony, or any other Misdemeanor within his Jurisdiction, may lawfully execute it, whether the Person mentioned in it be in Truth guilty or innocent, and whether he were before indicted

was valid if there were “strong Grounds of Suspicion for a Felony or other Misdemeanor” amounting to “such a probable Cause, as might induce a candid and impartial Man to suspect the Party to be guilty.”²³⁴

Hawkins’s position regarding felony arrest warrants may not have involved as large a change as it may initially seem, however, insofar as Hawkins still cautioned that justices of the peace should exercise great caution in issuing felony arrest warrants²³⁵ and also noted that the “safe way of proceeding” would be for the complainant “who hath the suspicion, to make the arrest in his proper person, and to get a warrant from a justice of peace to the constable to keep the peace”—that is, Hawkins still advised the same indirect use of a warrant to keep the peace during a felony arrest that Coke had endorsed for felony arrest warrants under Marian practice.²³⁶

Additionally, writing in 1769, Blackstone followed Hale, rather than Hawkins, in asserting that it was “fitting” for a magistrate “to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted,” and even some post-framing American manuals continued to repeat that requirement.²³⁷ Thus, notwithstanding

of the same Offence or not, and whether any Felony were in Truth committed or not ; for however the Justice himself may be punishable for granting such a Warrant without sufficient Grounds, it is reasonable that he alone be answerable for it, and not the Officer, who is not to examine or dispute the Reasonableness of his Proceeding ; and therefore it seems that old Books . . . which say generally, That no one can justify an Arrest upon a Suspicion of Felony, unless he himself suspect the Party, and unless the Felony were in Truth committed, ought to be intended only of Arrests made by a Person of his own Head, or in Obedience to the Command of a Constable, or other such like ministerial Officer, and not of such as are made in Pursuance of the Warrant of a Justice of Peace . . .

2 *id.* See also 2 LEACH’S HAWKINS, *supra* note 217, at 135-36.

²³⁴ 2 HAWKINS, *supra* note 217, at 84-85; 2 LEACH’S HAWKINS, *supra* note 217, at 135-36.

²³⁵ 2 HAWKINS, *supra* note 217, at 84-85 (stating that “a Justice of Peace cannot well be too tender in his Proceedings” involving arrest warrants); 2 *id.* at 135 (same).

²³⁶ 2 *id.* at 85 (sec. 19), 136. Compare to Coke’s discussion of pre-indictment felony arrest warrants set out in *supra* notes 189-91 and accompanying text.

²³⁷ 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 287. This statement was still repeated in post-framing American sources such as RICHARD BACHE, THE MANUAL OF A PENNSYLVANIA JUSTICE OF THE PEACE CONTAINING PRINCIPALLY THE LAWS,

Hawkins's views, it appears that an allegation of a crime-in-fact was still widely regarded as a requirement for an arrest warrant in framing-era law.

For present purposes, the most significant point is that the differences between the framing-era authorities and Coke's writings had to do primarily with the authority of justices to issue warrants prior to an indictment, but that there was virtually no change in the standards for warrantless arrests. In particular, the framing-era authorities still reiterated both the rule that only a person who personally suspected guilt could make a warrantless arrest²³⁸ and the rule that a warrantless arrest could be lawful only if a felony had actually been committed.²³⁹ (Indeed, these requirements were still restated by American authorities contemporaneously with the framing of the Federal Bill of Rights.²⁴⁰)

Thus, despite the changes regarding the issuance of pre-indictment criminal warrants and the potential relaxation of the crime-in-fact standard for felony arrest warrants, the common-law standards for warrantless criminal arrests as well as for search warrants remained virtually unchanged during the century and half between Coke's writings and the framing era.

Additionally, the law of arrest and search continued to be a matter of common law explicated by the courts rather than statutory law.²⁴¹ (As noted above, Coke had described the early

ADJUDICATIONS, AND PROCESS FOR THE EXERCISE OF HIS JURISDICTION IN CRIMINAL CASES 138 (Philadelphia, 1814).

²³⁸ See *supra* note 155 and accompanying text.

²³⁹ See, e.g., *supra* note 155 and accompanying text.

²⁴⁰ For example, James Wilson, one of the American Framers, made the following statement in the law lectures he gave in Philadelphia in 1790-1791:

It is a general rule, that, at any time, and in any place, every private person is justified in arresting a traitor or a felon; and *if a treason or a felony has been committed*, he is justified in arresting even an innocent person, upon his reasonable suspicion that by such person it has been committed.

2 THE WORKS OF JAMES WILSON, *supra* note 215, at 685 (emphasis added).

Similarly, a 1788 New York printing of the justice of the peace manual *Conductor Generalis* included excerpts of an essay by a London high constable which noted that, in making a warrantless arrest, it was crucial to first determine "that a felony has really been committed" because that "is absolutely necessary to justify an arrest; a mistake here is fatal." HODGE'S CONDUCTOR, *supra* note 220, at 116. See also *infra* note 586.

²⁴¹ See 3 Cuddihy, *supra* note 25, at 1514 (noting that arrest authority was not addressed in American statutes prior to 1791). Cuddihy also noted the overall consistency

English statutes that had authorized arrests as having been merely “an affirmance of the common law.”²⁴²) Thus, during the framing-era, the law of arrest was still understood to be a component of the Cokean conception of “the law of the land.” However, there is an important caveat: the framing-era criminal procedure treatises and manuals did not use the terms “law of the land” or “due process of law” as frequently as one might expect. In fact, they rarely used “due process of law” at all.

E. The Framing-Era Connotations of “the Law of the Land” and “Due Process of Law”

The framing-era treatises and manuals on criminal procedure were works on legal doctrine intended for the practicing bench and bar, not political tracts. Hence, when they set out the common law of arrest, they cited earlier legal treatises (including Coke’s) and cases, but rarely cited Magna Carta 29 itself. Likewise, although they often used “the law of the land” to refer broadly to the national law, they rarely explicitly linked arrest standards to “the law of the land.”²⁴³

Framing-era commentators continued to use “process” and “process of law” primarily as Coke had used those terms to refer to written authority for an arrest or for the commencement of judicial proceedings.²⁴⁴ Although “process” may occasionally

of framing-era warrantless arrest standards with the common law articulated by Hale, Hawkins and, Burn. *See id.* (noting that “in the absence of legislation, the principal authority on [arrests without warrant] when the [Fourth A]mendment was forged and ratified were the customary practices of arrest that the three contemporary manuals for justices of the peace described” and that “[t]hese guides were fairly consistent on these practices, which were, essentially, summaries by Hale, Hawkins, and Burn of case law one and two centuries old”).

²⁴² *See supra* note 158.

²⁴³ For example, a word search indicates that “law of the land” appears seventeen times in the first volume of Blackstone’s *Commentaries* (1765 ed.) and ten times in the fourth volume (1769 ed.) which deals with criminal law and procedure. A handful of these references involved Magna Carta.

²⁴⁴ Like Coke, the later treatises and manuals treated “process of law” to include “original writs,” “indictments,” warrants, and other kinds of writs and precepts. For example, Hawkins discussed various forms of arrest warrants and outlawry in his chapter “Of Process.” 2 HAWKINS, *supra* note 217, at 281-307 (“CHAP. XXVII”); 2 LEACH’S HAWKINS, *supra* note 217, at 399. Blackstone did the same in his chapter on “Process upon Indictment.” 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 313-16 (“Chapter

have been used loosely to mean procedure, court procedure was usually designated as “*course of law*” or “*due course of law*.”²⁴⁵ As a result, framing-era Americans would still have understood that “*process of law*” referred primarily to written instruments that conferred authority.²⁴⁶ Hence, “*due process of law*” also would have still carried that connotation.

However, it is important to note that eighteenth-century legal commentators rarely used the term “*due process of law*” at all. For example, Hale and Hawkins used the term only in quotations of an early statute that had reiterated Magna Carta 29 or in referring to a few distinct forms of written judicial writs or precepts.²⁴⁷ Likewise, Blackstone used “*due process*” only twice

the twenty-fourth. Of Process upon an Indictment,” discussing “process to bring in the offender after indictment found”).

²⁴⁵ See *supra* note 200.

²⁴⁶ For example, James Wilson, one of the American Framers and an early justice of the Supreme Court, stated the following in his 1790-1791 lectures in law in Philadelphia:

On an indictment for any crime under the degree of treason or felony, the proper process to be first awarded, at common law, is a *venire facias*, which, from the very name of it, is only in the nature of a summons to require the appearance of the party. . . . On an indictment for felony or treason, a *capias* is always the first process.

2 THE WORKS OF JAMES WILSON, *supra* note 215, at 689-90 (second emphasis added).

²⁴⁷ Hale used the phrase “*due process*” very sparingly in his two-volume *The History of the Pleas of the Crown*. He used it in one passage that recited a partial paraphrase of Magna Carta 29 and also quoted a later statutory confirmation of that provision to the effect that no man was to be “taken, or imprisoned . . . or put to death without being brought to answer by due process of law.” 2 HALE, *supra* note 218, at 108 (quoting the statute “42 E. 3. *cap.* 3”). Beyond that, he twice observed that taking a life without “*due process of law*” (that is, without a warrant of execution issued on a valid conviction) was a felony. 1 HALE, *supra* note 218, at 411, 497. Hale also used the phrase when he wrote that “to compass a divorce between the king and queen by the king’s commission by due process of law was no treason,” but that it was treason if a man “without due process of law expressly compasseth the wounding or death” of the queen or prince. 1 HALE, *supra* note 218, at 128.

Sergeant William Hawkins’s *Pleas of the Crown*, the leading eighteenth-century two-volume treatise on criminal law and procedure, also used the phrase only as Hale had. Like Hale, Hawkins did quote Magna Carta 29 and confirmatory statutes that paraphrased that provision to the effect “[t]hat no Man shall be taken . . . imprisoned, &c. without being brought to answer by due Process of Law; nor be put to answer without Presentment before Justices, or Matter of Record, or by due Process, and Writ Original.” 2 HAWKINS, *supra* note 217, at 107-08; see also 2 LEACH’S HAWKINS, *supra* note 217, at 166-67. Hawkins quoted this statute in his discussion of bail.

Beyond that, there were few occasions when Hawkins referred to “*due process*.” Hawkins used “*due process*” once in the context of arrests (possibly arrest warrants):

in the four volumes of his *Commentaries*, and in both instances quoted one of the early statutes that reiterated Magna Carta 29 to the effect “that no man shall be put to death, without being brought to answer by due process of law.”²⁴⁸

Despite these caveats, however, there is no doubt that the American Framers were quite conversant with the Cokean conception of “the law of the land” and “due process of law.” A number of early colonial declarations of rights had paraphrased Magna Carta 29,²⁴⁹ and William Penn had published a copy of Magna Carta, including commentary largely taken from Coke’s, in Philadelphia in 1687.²⁵⁰ Moreover, during the eighteenth

Hawkins observed that “the Hindrance of the due Process of publick Justice” was a crime. 1 HAWKINS, *supra* note 217, at 66; *see also* 1 LEACH’S HAWKINS, *supra* note 217, at 100. A later passage indicates that the “Hindrance” referred to was of an arrest. *See* 2 HAWKINS, *supra* note 217, at 74; 2 LEACH’S HAWKINS, *supra* note 217, at 115 (stating, in a passage regarding arrest of criminals, that “assistants” (that is, accomplices) were punishable “for an hindrance in bringing them to publick justice”). Hawkins also used “due process” in a different context, seemingly referring to another form of written writ, when he stated that land forfeited for felony did not return to the local lord “till it appear by due Process that the King hath had his Prerogative” to waste the land for a year. 2 HAWKINS, *supra* note 217, at 448; *see also* 2 LEACH’S HAWKINS, *supra* note 217, at 637.

Additionally, to the extent that digital searches for “due process” can be trusted, that phrase seems to be completely missing from the leading framing-era authorities on civil litigation. For example, I have not been able to locate that phrase in FRANCIS BULLER, *INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* (London, 1772). For bibliographic information on this treatise, *see* 1 MAXWELL, *supra* note 13, at 335 (entry 3). Likewise, I have not found the phrase in ISSAC ESPINASSE, *A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS* (London, 1793) (two volumes). For bibliographic information on this treatise, *see* 1 MAXWELL, *supra* note 13, at 335 (entry 6).

²⁴⁸ 1 BLACKSTONE (1st ed. 1765), *supra* note 135, at 129-30 (quoting 28 Edw. III. c. 3); 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 313 (quoting same statute; this latter passage appears on the same page on which the chapter “OF PROCESS UPON AN INDICTMENT” begins).

²⁴⁹ In 1692, the legislature of Massachusetts Bay passed a declaration of rights that paraphrased Magna Carta 29 and also included a provision that “[n]o man . . . be taken or imprisoned . . . without being brought to answer by due process of law.” *See* MOTT, *supra* note 91, at 97, 98 n.43. New York copied those provisions in 1683, 1691, and 1697. *Id.* at 98 & n.46. Pennsylvania paraphrased Magna Carta 29 in enactments in 1683 and 1693. *Id.* at 99 & n.50. There were similar enactments in Maryland. *Id.* at 101-03. And in 1712 South Carolina enacted Magna Carta 29, the Petition of Right, and the Habeas Corpus Act, as did North Carolina in 1749. *Id.* at 104. *See also* HOWARD, *supra* note 103, at 35-98.

²⁵⁰ *See* WILLIAM PENN., *THE EXCELLENT PRIVILEGE OF LIBERTY AND PROPERTY* (Philadelphia, 1687). According to one authority, the commentary on Magna Carta in Penn’s book was “largely taken from Coke’s Second Institute.” ELDON REVARE JAMES, *A LIST OF LEGAL TREATISES PRINTED IN THE BRITISH COLONIES AND THE AMERICAN STATES*

century, Coke's *Institutes* were among the most widely held law books in American colonial libraries,²⁵¹ and the Framers' generation still learned law by reading Coke's *Institutes*.²⁵² Additionally, although information on colonial court proceedings is incomplete, surviving records indicate that Coke's writings appear to have been the most frequently cited authorities in colonial cases.²⁵³ Indeed, the Cokean conception of the immemorial common-law rights of Englishmen became especially prominent during the decade leading up to the American Revolution when American Whigs sought authority to support their claims to English rights and liberty.²⁵⁴ During that period, Blackstone also recited the entire Whig canon of Magna Carta, the Petition of Right, and the Habeas Corpus Act,²⁵⁵ while praising Magna Carta 29 in particular.²⁵⁶

It also appears that framing-era Americans imported substantial numbers of Francis Sullivan's *Lectures*, a work initially published in 1772 which virtually replicated Coke's specific statements regarding the incorporation of common-law warrantless arrest authority in Magna Carta 29.²⁵⁷ A number of

BEFORE 1801, at 7 (Lawbook Exch., Ltd. 2002) (1934). An excerpt of Penn's book is reprinted in HOWARD, *supra* note 103, at 412-25.

²⁵¹ See, e.g., HOWARD, *supra* note 103, at 118-19, 122-24 (asserting that Coke's writings were more often found in colonial libraries than any other law books).

²⁵² See *supra* note 123.

²⁵³ See HOWARD, *supra* note 103, at 132 & n.55.

²⁵⁴ See, e.g., HOWARD, *supra* note 103, at 145-64 (discussing references to Coke and Magna Carta in prerevolutionary arguments).

²⁵⁵ See *supra* note 214 and accompanying text.

²⁵⁶ For example, Blackstone wrote the following about the importance of Magna Carta 29:

And, lastly, (which alone would have merited the title that it bears, of the *great* charter [Magna Carta]) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeit by the judgment of his peers or the law of the land.

4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 417.

²⁵⁷ FRANCIS STOUGHTON SULLIVAN, *LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND: WITH A COMMENTARY ON MAGNA CHARTA* (London, 1770). Subsequent editions were published in 1776 and 1790 by Gilbert Stuart. See 1 MAXWELL, *supra* note 13, at 108. I cite the 1776 edition. An American edition was published in 1805.

In his discussion of the content of Magna Carta 29, Sullivan wrote:

THE maxim, then, is that no man shall be taken and committed to prison but by *judicium parium, vel per legem terrae*, that is, by due process of law. Now to understand this, it is necessary to see in what cases a man may be taken before presentment or indictment by a jury; and in the enquiry it is to be consid-

ered, that process of law, for this purpose, is two-fold, either by the king's writ, to bring him into a court of justice, to *answer*, or by what is called a *warrant in law*. And this is, again, two-fold, *in[]deed*, by the authority of a legal magistrate, as a Justice of Peace's *mittimus*, or that which each private person is invested with, and may exercise.

SULLIVAN, *supra* note 257, at 368-69 (bracketed space inserted to correct apparent typographical error). After discussing requirements for valid written warrants, *id.* at 369, Sullivan then discussed the authority a private person possessed to make warrantless arrests. I set out this passage to allow the reader to compare how closely it tracks the passages from Coke's discussion.

LET us see how far the law warrants a private person to take another, and commit him to prison. First, then, if a man is present when another *commits* treason, felony, or notorious breach of the peace, he hath a right instantly to arrest and commit him, lest he should escape[;] if any affray be made, to the breach of the peace, any man present may, during the continuance of the affray, by a warrant in law, in order to prevent imminent mischief, restrain any of the offenders ; but if the affray is over, so that the danger is perfectly past, there is a necessity of an information, and an express warrant; so, if one man wounds another dangerously, any person may arrest him, that he be safely kept, until it be known whether the party wounded shall die or not. Suspicion, also, where it is violent and strong, is, in many cases, a good cause of imprisonment. Suppose a *felony done*, and the hue and cry of the country is raised, to pursue and take the offender, any man may arrest another whom he finds flying; for what greater presumption of guilt can there be, than for a person, instead of joining the hue and cry as his duty prompts him, to fly from it ? His good character or his innocence, how clear it may after appear, shall not avail him. His imprisonment is lawful.

ANOTHER lawful cause of arresting and imprisoning upon suspicion is, if a treason or felony *is certainly done* ; and though there is no certain evidence against any person as the perpetrator, yet if the public voice and fame is, that A is guilty, it is lawful for any man to arrest and detain him. So, if a treason or felony *be done*, and though there be no public fame, any one that suspects another for the author of the fact may arrest him. But let him that so doth, take care his cause of suspicion will be such as will bear the test; for otherwise he may be punishable for false imprisonment. The frequent keeping company with a notorious thief, that is, one that had been convicted, or outlawed, or proclaimed as such, was a good cause of imprisonment. Lastly, a watchman may arrest a night-walker at unseasonable hours by the common law, however peaceably he might demean himself ; for strolling at unusual hours was a just cause of suspicion of an ill intent. With respect to persons arrested by private authority, I must observe, that the law of England so abhors imprisonment, without a certain cause shewn, that if there is not an information on oath sworn before a magistrate, and his commitment thereon in a competent time, which is esteemed twenty-four hours, the person is no longer to be detained.

SUCH is the law of England with respect to the personal liberty of the subject.

Id. at 369-70 (emphases added; footnotes omitted) (citing 2 Institute, p. 51-55.). I have italicized portions of this discussion to highlight the warrantless arrest requirement of a crime actually committed in fact. Compare the statements by Coke quoted *supra* text accompanying notes 149, 155.

other works that were available in framing-era America also included the text of Magna Carta and commentaries derived from Coke's, several of which printed an "abstract" of Coke's chapter on Magna Carta 29, including his general statements treating warrantless arrest authority as a form of "process of law" and requiring that such arrests comply with "the law of the land" (though these abstracts did not set out Coke's more detailed presentation of common-law warrantless arrest standards).²⁵⁸ Thus, we can be confident that the Framers of the initial state declarations were familiar with what Coke had written about Magna Carta 29.

F. Summary

In sum, it appears that framing-era Americans would have understood the term "the law of the land" to include the common-law requisites for initiating and conducting valid criminal prosecutions, as well as other aspects of common-law criminal procedure. It also appears that they would have understood "due process of law" as Coke had used that term to connote primarily the legal requisites for initiating criminal prosecutions, including arrests and indictments. Indeed, that is how those terms appear to have been used in the "law of the land" and "due process of law" provisions that the State Framers included

My conclusion that Sullivan's *Lectures* was widely imported is based on a Worldcat search of the catalogs of public libraries in the United States which identified forty-nine copies of the 1772 edition and forty-three copies of the 1776 edition. (There are also thirty copies of a 1790 edition and roughly one hundred of an 1805 American edition of the work.) I am indebted to my colleague, Professor Sibyl Marshall, for that information.

²⁵⁸ See, e.g., HENRY CARE, *ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE* (initially published in London in 1684; later London editions in 1691, 1700, 1703, 1719; reprinted in Boston 1721, Providence 1774) (see 1 MAXWELL, *supra* note 13, at 154-55); GILES JACOB, *EVERY MAN HIS OWN LAWYER* 367 (Ten London editions 1736-1788) (see 1 MAXWELL, *supra* note 13, at 33); SAMUEL JOHNSON, *A HISTORY AND DEFENCE OF MAGNA CARTA* (London and Dublin printings 1769, 1772) (see 1 MAXWELL, *supra* note 13, at 550); JOHN SOMERS, *A GUIDE TO THE KNOWLEDGE OF THE RIGHTS AND PRIVILEGES OF ENGLISHMEN* (London printings in 1757, 1771) (see 1 MAXWELL, *supra* note 13, at 159); *GOLDEN PASSAGE IN THE GREAT CHARTER OF ENGLAND CALLED MAGNA CARTA* (London printings 1775, 1776); GAINES'S *CONDUCTOR*, *supra* note 220, at 442 (Appendix including "Notes on Magna Carta").

in the state declarations of rights adopted prior to the Federal Bill of Rights.

III. THE TWO SEARCH-AND-SEIZURE PROVISIONS IN THE STATE DECLARATIONS OF RIGHTS

Two strands of earlier English Whig thought shaped the ideology of the American Revolution: the Lockean claim of social contract and self-government by a representative legislature, and the Cokean claim to immemorial common-law rights.²⁵⁹ The Lockean component is evident insofar as the state constitutions plainly made the elected legislatures the primary law-making bodies. However, the State Framers embraced only the concept of legislative primacy, not the notion of legislative “sovereignty” that emerged in England after the Glorious Revolution of 1688, under which Parliament itself was not subject to legal constraints.²⁶⁰

²⁵⁹ See, e.g., MOTT, *supra* note 91, at 90.

²⁶⁰ See, e.g., Blackstone’s 1765 statement asserting parliamentary sovereignty and rejecting judicial review of parliamentary statutes:

. . . if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of the rule [that acts of parliament that are impossible to be performed are of no validity] do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.

1 Blackstone (1st ed. 1765), *supra* note 135, at 91.

Americans rejected parliamentary sovereignty.²⁶¹ Indeed, the grievances that prompted the American Revolution were largely grievances against parliamentary statutes that Americans perceived as infringements on their entitlement to the immemorial rights possessed by Englishmen. Thus, when the American Framers adopted state constitutions, they usually limited the otherwise plenary powers of the state legislature by setting out a declaration of reserved rights.²⁶²

²⁶¹ Historians of the American Revolution generally identify American rejection of parliamentary sovereignty as the central constitutional dimension of that conflict. For example, Professor Reid has observed:

The British were looking ahead to a constitution of parliamentary command, in which the government was entrusted with arbitrary power and civil rights were grants from the sovereign. What remained [for British reformers] was to make the sovereign [legislature] more representative of society, so that government, even though arbitrary, would be government by consent. The Americans were looking backward, not to government by [representative] consent but to government by the rule of law, to . . . a sovereign that did not grant rights but was limited by rights, a sovereign that was, like rights, created by law, the guardian of civil rights. What remained [for American whigs] was to devise an instrument to limit government when it threatened rights, so that rights, not government, would be secured.

....

American whigs began their resistance in 1765 in the belief that Parliament was acting unconstitutionally. They went to war in 1775 in the belief that they were fighting to defend . . . the constitution of limited government and of property in rights that once had been the English constitution. They were rebelling against the constitution of arbitrary power that the British constitution [of parliamentary sovereignty] was about to become.

REID, *supra* note 30, at 236-37. See also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 260-62 (1969); C. BRADLEY THOMPSON, *JOHN ADAMS AND THE SPIRIT OF LIBERTY* 79-87 (1998); MOTT, *supra* note 91, at 56-65, 90-105.

²⁶² See, e.g., WOOD, *supra* note 261, at 271-73. Although there are a number of book-length studies of the early state constitutions and declarations of rights, they tend to be largely directed to the overall frame of government and appear to have been written by authors who were neither particularly interested in nor knowledgeable about framing-era criminal procedure. Additionally, although these works tend to recognize the tension between legislative power and rights, they typically stop short of demarcating the limits of legislative power. For example, Professor Kruman made the following general statement regarding the American perception that legislators could be "oppressors":

In developing theories of rights and governmental restraint, the authors of the first state constitutions retained the traditional belief that declarations of rights protected the people from their rulers, but they perceived danger in different parts of government. Whereas English constitutionalists located the threat of tyranny in the monarch, revolutionary constitution makers identified both legislators and executives as political oppressors.

A. *The State Declarations of Rights*

Upon independence, twelve of the fourteen original states (counting Vermont) adopted new constitutions; of those, eight also adopted declarations of rights (and New York also later did so in 1787). The contents of the state constitutions and declarations reflect the Cokean conception of pre-existing common-law rights. For example, George Mason, the principal drafter of the initial 1776 Virginia Declaration of Rights, described that declaration as having set out rights “paramount to the power of the legislature.”²⁶³ Likewise, Edmund Randolph also described the Virginia Declaration as having been adopted to assure “that the legislature should not in their acts violate any of those canons,”²⁶⁴ and Patrick Henry described the Virginia declaration

MARC W. KRUMAN, *STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 36 (1997). However, in a subsequent discussion of the state declarations of rights themselves, Kruman asserted that “[t]o some extent, [state] constitution makers designed the declarations of rights to inhibit the power of magistrates [i.e., governors] and enhance the authority of legislatures, which they viewed as bulwarks of popular liberty against executive prerogative,” and, further, “[t]he [state] framers . . . expressed this traditional understanding of a declaration of rights as a curb on the magistrate by permitting the legislatures to limit key procedural rights.” As the first example of legislative empowerment, Kruman noted (incorrectly) that “[a]ll of the declarations prescribed that only ‘by the judgment of peers, or by the law of the land’ could a person be imprisoned or deprived of property, liberty, or life.” *Id.* at 42. Kruman does not explain how a state law of the land provision in a declaration of rights permitted the legislature to “limit” criminal procedure rights, but it would appear that he misinterpreted those provisions as though legislatures, rather than common law, would determine the content of the law of the land. Some studies generally assert that legislative power was meant to trump rights. *See, e.g.*, DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 66 (1980) (asserting that the state “bills of rights were not generally incorporated into constitutions” and that they “did not effectively prohibit or limit legislative action”). For other generalized studies of the early state constitutions, see the works cited in Davies, *supra* note 2, at 669 n.328.

²⁶³ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 444 (Jonathan Elliot ed., 2d ed. 1838) [hereinafter ELLIOT’S DEBATES] (reporting Mason’s description of the 1776 Virginia declaration during the 1788 Virginia ratification convention).

²⁶⁴ Randolph wrote the following regarding the 1776 Virginia Declaration of Rights:

In the formation of this bill of rights two objects were contemplated: one, that the legislature should not in their acts violate any of those canons; the other, that in all the revolutions of time, of human opinion, and of government, a perpetual standard should be erected, around which the people might rally, and by a notorious record be forever admonished to be watchful, firm and virtuous.

as having guaranteed "the common law" would be "in force."²⁶⁵ That goal was not confined to Virginia; the voters of Massachusetts refused to endorse a state constitution until a declaration of rights was added to protect common-law rights against the possibility of legislative usurpation.²⁶⁶

The State Framers also focused on controlling the legislature, the courts, and possibly the governor,²⁶⁷ *rather than* controlling the conduct of ordinary officers. Although this point has been almost entirely overlooked in constitutional commentaries, the Framers drafted declarations of rights under a different and more restrictive conception of the boundary of government action than that used in modern constitutional theory. The current notion that constitutional standards, such as search-and-seizure standards, address the conduct of ordinary officers dates back only to the beginning of the twentieth century.²⁶⁸ Under framing-era doctrine, legislation and court orders were governmental in character, so it was possible to conceive of an "unconstitutional" statute or an "unconstitutional" general warrant issued by a court.²⁶⁹ However, there was no conception that an ordinary officer could act "unconstitutionally"; rather, an ordinary peace officer acted as the government only when he acted *within* the lawful authority of his office, but if he exceeded that authority and acted unlawfully, he was deemed to act in "dece[it]" of the government and his conduct lost any official character.²⁷⁰ Thus, the Framers would never have described a constable's unlawful arrest or search as an "unconstitutional" arrest (which is why the Framers never considered an exclu-

Edmund Randolph's Essay on the Revolutionary History of Virginia, (1774-1782), in 44 VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY 47 (1936).

²⁶⁵ See *infra* note 412.

²⁶⁶ See *infra* note 353 and accompanying text.

²⁶⁷ The state constitutions gave governors relatively little power. See, e.g., WOOD, *supra* note 261, at 272 (noting that "precisely because the power of the rulers or governors was so circumscribed by the body of the [initial state] constitutions, men in [several] states saw no need for any such lengthy and separate delineations of the people's liberties [in declarations of rights]"). See also *id.* at 148-50.

²⁶⁸ See *infra* note 647 and accompanying text.

²⁶⁹ See Davies, *supra* note 2, at 660.

²⁷⁰ See 3 BLACKSTONE (1st ed. 1768), *supra* note 135, at 255 (noting that in the event of misconduct by an officer "the king has been deceived"); see also Davies, *supra* note 2, at 660-67.

sionary rule).²⁷¹ Rather, the officer who acted unlawfully was simply a private wrongdoer who was subject to trespass lawsuits like any other private wrongdoer.²⁷²

The State Framers did not undertake to impose novel limits on the state legislatures; rather, they undertook to preserve existing rights against legislative usurpation. Indeed, that is why they initially crafted “declarations” of rights. Thus, the State Framers drew the contents of the curbs they placed on legislative power from the obvious source, the Cokean tradition of settled common-law rights.

The criminal procedure provisions included in the state declarations reflected two different sets of concerns. Some of the provisions included in the state declarations were specific responses to prerevolutionary grievances: these included, for example, the grievance over the use or threatened use of general warrants for customs searches of houses (which prompted the provisions banning general warrants);²⁷³ the grievance over the use of civil-law inquisitorial procedure in criminal prosecutions conducted in the vice-admiralty courts (which prompted provisions protecting trial by jury and various trial rights);²⁷⁴ and the

²⁷¹ The restrictive framing-era conception of what we now call “state action” also explains why the framing-era remedy for an unlawful arrest or search was a damages lawsuit against the offending officer, rather than exclusion of unconstitutionally seized evidence; the exclusionary rule that was announced in the early twentieth century is a response to governmental illegality rather than private unlawfulness, so it could not be formulated under the framing-era conception that unlawful acts by officers were only private wrongs. However, once the Supreme Court expanded the boundary of government “action” to include all acts committed by officers in connection with their office, including unlawful acts, the necessary premise for applying the doctrine of the nullity of unconstitutional government acts to unlawful searches was met. See Davies, *supra* note 2, at 664-66. See also Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1852-66 (2002); Thomas Y. Davies, *An Account of Mapp v. Ohio That Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 622-25 (2007).

²⁷² See Davies, *supra* note 2, at 661-62. There was no concept of official immunity. In fact, if a justice of the peace acted outside of the lawful authority of his office, for example by issuing a general warrant, he was also subject to trespass damages. See *id.* at 588.

²⁷³ See REID, *supra* note 30, at 193-98 (discussing the colonial “search warrant grievance”). See also *supra* notes 50-57 and accompanying text.

²⁷⁴ See REID, *supra* note 30, at 177-83; Davies, *Crawford*, *supra* note 19, at 122-23 n.52 (discussing the grievance against the expansion of the vice-admiralty courts generally and the famous smuggling prosecution of John Hancock in the Boston Vice-Admiralty Court).

grievance over the threat that colonists might be transported to London to stand trial (which prompted provisions requiring jury trials in the local vicinity or vicinage).²⁷⁵

Other criminal procedure provisions included in the state declarations did not respond to recent grievances but instead reiterated protections that had emerged in response to earlier abuses in English constitutional history. For example, the Framers of the state declarations drew upon the Whig canon when they included provisions that guaranteed habeas corpus, and prohibited excessive bail, self-accusation, and double-jeopardy, matters that do not appear to have been the subject of specific prerevolutionary controversies. The most common provisions of this latter sort took the form of paraphrases of the “law of the land” chapter of Magna Carta that typically included prohibitions against a person being “taken” or “arrested” except according to the law of the land.²⁷⁶ Indeed, provisions of this type had long been included in earlier colonial assertions of rights.²⁷⁷

Thus, the state declarations typically included *two provisions* that addressed the topic that we now call search and seizure: a broadly stated “law of the land” or “due process of law” provision that included the traditional protection against arbitrary arrest and a more focused ban against the use of too-loose warrants that specifically responded to the then-recent general-warrant controversies.

This part of the article presents evidence that the state “law of the land” and “due process of law” provisions were understood to address the initiation of criminal prosecutions, including arrests, but that the state provisions relating to warrants were focused on warrant standards. I think that aspect of the story is quite clear. As previously noted, there is relatively little direct evidence as to how strongly the state “law of the land” and “due process of law” clauses were understood to constitutionalize common-law arrest standards themselves, but that silence

²⁷⁵ See REID, *supra* note 30, at 173, 175.

²⁷⁶ See *infra* notes 289, 314, 320, 323, 342, 348, 356, 396 and accompanying text.

²⁷⁷ See *supra* note 249.

likely reflects a shared assumption that the legal standards for arrest were set by the settled common-law standards.

*B. Search-and-Seizure Protections in the
Initial 1776 Virginia Declaration*

Virginia adopted the first state constitution and declaration of rights in the late spring of 1776, shortly before the Declaration of Independence.²⁷⁸ The Virginia Declaration of Rights included three provisions that addressed criminal procedure, two of which implicated what we now call search and seizure. The final clause in the main criminal procedure provision, Section 8, provided that “no man be deprived of his liberty except by the law of the land, or the judgment of his peers.”²⁷⁹ Section 10 then banned “general warrants.”²⁸⁰ Tracing the textual evolution of these provisions sheds some light on their respective contents.

1. Mason’s Draft

Although very little in the way of legislative history for the early state declarations has survived, there is a surviving copy of the draft that George Mason initially submitted to the larger Virginia committee.²⁸¹ Mason, who was well versed in English constitutional history,²⁸² seems to have undertaken to limit the contents of the declaration to only the most essential principles of liberty. In keeping with that approach, he proposed only a single section on criminal procedure:

That in all capital or criminal Prosecutions, a Man hath a right to demand the Cause and Nature of his Accusation, to be confronted with the Accusers or Witnesses, to call for Evidence in his favour, and to a speedy Tryal by a Jury of his Vicinage; without whose unanimous Consent, he can not be found guilty, nor can he be compelled to give Evidence against himself. And

²⁷⁸ See 10 STATE CONSTITUTIONS, *supra* note 62, at 48-56 (setting out 1776 Virginia Declaration of Rights and Constitution).

²⁷⁹ See DUMBAULD, *supra* note 62, at 170-71.

²⁸⁰ See *id.* at 170, 172 (sec. 10).

²⁸¹ See HELEN HILL MILLER, GEORGE MASON: GENTLEMAN REVOLUTIONARY 337-38 (app. 1) (1975).

²⁸² See HOWARD, *supra* note 103, at 205.

*that no Man, except in times of actual Invasion or Insurrection, can be imprisoned upon Suspicion of Crimes against the State, unsupported by Legal Evidence.*²⁸³

I have italicized the final sentence in this proposed provision because I think it amounted to an incorporation of the common law of arrest, albeit with a focus on arrests for treason.

Admittedly, a modern reader unfamiliar with common-law jargon could easily overlook the arrest standards that are connoted by Mason's language. Today, a reference to "imprison[ment]" would usually connote punishment after a conviction at trial. However, in framing-era legal discourse, "imprisonment" was still a virtual synonym for arrest.²⁸⁴ (Indeed, death, rather than imprisonment, was the usual punishment for treason.) Moreover, as noted in the prior part, the big issues surrounding imprisonment in English constitutional history had involved arbitrary arrest and imprisonment prior to (or without any) trial. Thus, when Mason condemned imprisonment "upon Suspicion . . . unsupported by Legal Evidence" he rejected arrests on nothing more than "suspicion" of treason and implicitly invoked the common-law requisites for a lawful arrest: "Evidence" meant testimony under oath,²⁸⁵ so "Legal Evidence" in Mason's passage invoked the usual common-law requirements, set out above, that an arrest (with or without warrant) had to be based upon a sworn accusation by a named complainant that a crime had actually been committed "in fact," as well as grounds to suspect the arrested person as the offender.²⁸⁶ Thus, the final clause in Mason's criminal procedure section seems to have implicitly invoked common-law arrest standards, albeit only with regard to treason.

²⁸³ See MILLER, *supra* note 281, at 337 (emphasis added).

²⁸⁴ See 2 COKE, *supra* note 13, at 589 (stating that "a felon that is under custody of the kings officer" is "an imprisonment" and that "he that is in the stockes, or under lawful arrest, is said to be in prison"); 1 BLACKSTONE (1st ed. 1765), *supra* note 135, at 132 (stating that "[t]he confinement of the person, in any wise, is an imprisonment. So that the keeping [of] a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment.").

²⁸⁵ See *supra* note 147.

²⁸⁶ See *supra* notes 151, 222, 239, 257 and accompanying text.

There is no direct evidence as to why Mason was content to address only treason arrests. One possibility is that he perceived the law of arrest to be generally settled and noncontroversial, but thought that treason was the situation in which legal standards were most likely to be stretched or breached; hence, his final clause may have focused on what he perceived to be problematic rather than what he perceived to be settled. Thus, Mason apparently perceived that departures from settled arrest law were most likely in instances of treason, so he included an arrest provision that was the functional equivalent of the Habeas Corpus Suspension Clause later included in the 1787 Federal Constitution. Notably, Mason's final statement regarding treason arrests was the *only* search-and-seizure provision Mason proposed; he did not propose any ban against general warrants.

2. The Virginia Committee Draft

The legislative committee charged with drafting the Virginia declaration (which included the young James Madison among others)²⁸⁷ apparently concluded that the declaration should set out a fuller treatment of important criminal procedure rights than Mason had proposed. Thus, the committee expanded on Mason's articulation of criminal procedure protections in three ways: (1) the committee broadened the statement of the arrest protection regarding treason at the end of Mason's criminal procedure provisions by substituting a broader paraphrase of Magna Carta's "law of the land" provision; (2) the committee added language—copied from the English Bill of Rights of 1689—that forbid excessive bail, excessive fines, and "cruel or unusual" punishments; and (3) the committee added a provision that specifically banned unparticularized or unsupported warrants.²⁸⁸

a. "Law of the land." In the criminal procedure provision that Mason had proposed, the committee replaced Mason's final

²⁸⁷ See 1 THE PAPERS OF JAMES MADISON 170-71 (William T. Hutchinson & William M.E. Rachal, eds., 1962).

²⁸⁸ See MILLER, *supra* note 281, at 338-39 (secs. 10, 11, and 12).

sentence forbidding arrest for treason without "Legal Evidence" with the italicized language:

10. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; *that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.*²⁸⁹

This final clause obviously paraphrased the "law of the land" chapter of Magna Carta. Moreover, because this provision replaced Mason's arrest provision, and because the Virginia committee addressed *only deprivation of "liberty"* in this paraphrase, rather than the full range of protected interests set out in Magna Carta 29 itself,²⁹⁰ it seems apparent that this "law of the land" provision was focused on arrest and pretrial criminal procedure.

Additionally, it seems probable that this "law of the land" clause constitutionalized common-law arrest standards. For one thing, the Virginia Framers were quite familiar with Coke's writings in 1776, and Coke had treated "the law of the land" as including common-law arrest law.²⁹¹ For another, arrest standards were still a matter of common law rather than legislation in Virginia.²⁹² As noted above, there also are some recorded statements that indicate that leading Virginia Framers intended for the declaration to set limits on the legislature;²⁹³ that being the case, the invocation of "the law of the land" would not

²⁸⁹ See *id.* at 339. Because the Cokean meaning of the "law of the land" guarantee in Magna Carta 29 included the requirement of an indictment as a predicate to a felony trial, this language would have connoted the common-law requirement of a valid indictment prior to a criminal trial. Thus, in contrast to modern assessments based solely on parsing the words of the text, the Virginia committee did not omit the requirement of a grand jury indictment; rather, the committee simply expressed that requirement in the framing-era idiom of "the law of the land."

²⁹⁰ Magna Carta 29 itself protected against deprivations of life, liberty, and a variety of property interests in addition to "liberty." See the text set out *supra* note 132.

²⁹¹ See *supra* notes 143-79 and accompanying text.

²⁹² See *supra* note 25.

²⁹³ See *supra* notes 263-65 and accompanying text.

seem to have served the purpose unless that term were understood as an invocation of common-law standards.

It should not be surprising that the committee used the invocatory phrase “the law of land” rather than spell out common-law arrest and indictment standards. As described in the previous part, those standards were sufficiently complex (for example, applying different rules for felony and misdemeanor arrests) that they could not easily be reduced to a short clause appropriate to a declaration of rights. Additionally, there had been no prerevolutionary controversy over arrest law itself; rather, the common law of arrest and indictment appeared to be quite settled.²⁹⁴ Thus, it seems likely that the Virginia committee assumed that the traditional “law of the land” formulation would be sufficient to preserve common-law arrest standards. The committee’s proposed criminal procedure provision was then adopted by the legislature without change, but was numbered Section 8.²⁹⁵

b. Excessive bail. The Virginia committee next added a provision taken directly from the English Bill of Rights of 1689:

11. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.²⁹⁶

Of course, this also became the content of the Federal Eighth Amendment.²⁹⁷ Although we now tend to regard this provision primarily as a ban against “cruel and unusual punishments”—especially because American jurisdictions have moved away from the concept of a right to bail²⁹⁸—in 1776, the ban against excessive bail likely was viewed as the most salient aspect of the protection. That likely was so because the habeas

²⁹⁴ See *supra* notes 238-40 and accompanying text.

²⁹⁵ See DUMBAULD, *supra* note 62, at 170-71.

²⁹⁶ See MILLER, *supra* note 281, at 339. The English Bill of Rights of 1689 had included the provision:

That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

See SOURCES, *supra* note 104, at 245, 247.

²⁹⁷ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).

²⁹⁸ See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987).

corpus remedy for unlawful arrest or imprisonment often involved release on bail, and English history demonstrated that excessive bail could effectively blunt the value of the habeas corpus remedy.²⁹⁹ Of course, the fact that the Virginia Framers took a provision verbatim from the English Bill of Rights of 1689 underscores their familiarity with the Whig canon of the historic rights of Englishmen.

The fact that this provision (like virtually all of the other state bail provisions) only banned excessive bail, but did not set an explicit right to bail is significant.³⁰⁰ That silence cannot be interpreted to mean that there was no right to bail because there was a settled doctrinal understanding that bail had to be available except for offenses "of a very enormous nature" (typically capital cases).³⁰¹ Moreover, the historical abuses had taken the form of requiring excessive bail, rather than outright denials of bail. Thus, the absence of an explicit statement of a right to bail appears to have been another instance in which the constitutional text explicitly addressed what appeared to have been problematic, but left unstated a crucial but commonly understood premise.³⁰²

The inclusion of a distinct protection regarding bail also reveals that the Virginia Framers understood that the Cokean concept of "the law of the land" did not encompass all aspects of common-law criminal procedure. Rather, that concept was time-bound insofar as Coke's writings did not mention protections, such as the ban against excessive bail, that were not achieved until the late seventeenth century, long after Coke's time. Hence, the protection against excessive bail was not ade-

²⁹⁹ See SOURCES, *supra* note 104, at 235-36. See also Blackstone's reference to the protection against excessive bail in the English Bill of Rights, quoted *supra* note 214.

³⁰⁰ There was one exception; the short bill of rights included in the 1787 Northwest Ordinance stated a right to bail. See *infra* note 474.

³⁰¹ 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 295. According to Blackstone, justices of the peace could not release on bail arrestees charged with treason, murder, or other specified offenses, and justices had some discretion with regard to some other offenses of a "dubious nature," but there was a "last class" of arrestees "such as *must* be bailed upon offering sufficient surety." Moreover, the judges of the Court of King's Bench could order release on bail "for any crime whatsoever." See 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 295-96.

³⁰² See *supra* text accompanying notes 28-34.

quately protected simply by invoking the “law of the land”; rather, it had to be stated separately.³⁰³

c. The ban against general warrants. The Virginia committee also responded to the then still-recent grievance against general warrants by explicitly banning such warrants. Here also, the committee members would have recognized that the “law of the land” provision would have been insufficient to ban general warrants themselves because that common-law prohibition had developed after Coke’s time, and had only recently been finally settled.³⁰⁴ Thus, in contrast to their use of the invocatory “law of the land” language for arrest authority, the Virginia committee proposed a specific and explicit prohibition that too-loose warrants “ought not be granted”.³⁰⁵

12. That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and ought not to be granted.³⁰⁶

Two aspects of this provision should be noted. One is that it is the most detailed of any of the criminal procedure clauses in the Virginia declaration. Presumably, that is because it addressed a topic on which the law had not been long settled. The other aspect is that this provision is very narrowly focused, as it simply bans the use of too-loose warrants, but says nothing about when warrants must be used.

This silence regarding the need for warrants appears to reflect an implicit assumption that common-law rules would per-

³⁰³ As noted above, the prohibition against excessive bail was not fully accomplished until the English Bill of Rights of 1689. See *supra* note 299.

³⁰⁴ See *supra* notes 47-55 and accompanying text (discussing the general writ controversies of the late eighteenth century).

³⁰⁵ Some historians have insisted that the use of “ought” in the state declarations was not as imperative as the use of “shall” in the Federal Bill of Rights. I think that is incorrect, and that the change was merely stylistic. See Davies, *supra* note 2, at 675 nn.349-50.

³⁰⁶ See MILLER, *supra* note 281, at 339. The use of the term “messenger” in this provision is noteworthy; the officers who executed the general warrants in the Wilkesite cases were “messengers” who served the English Secretary of State, so use of that term appears to reflect the influence in Virginia of the English Wilkesite cases in which general warrants were ruled to be contrary to common law. See *supra* note 53.

sist. As noted above, the common-law rule that a felony warrant was required to justify breaking a house was a settled part of the Cokean content of "the law of the land."³⁰⁷ Additionally, there had been no prerevolutionary controversy as to whether a warrant was necessary to justify a search of a house; rather, the controversy had been over the standards for valid warrants. Hence, it appears that the Virginia drafters explicitly addressed only the point that had been a matter of controversy, but left the settled underlying premise of the necessity of a warrant for a house search unstated.³⁰⁸

Although the committee draft set out warrant standards that effectively banned general warrants, it did not actually use the term "general warrant." The legislature was apparently unhappy that the provision did not ban "general warrants" explicitly, because it rewrote the committee proposal so that it did include that term. In final form (and final numbering), this section then read:

Sec. 10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.³⁰⁹

In addition to explicitly condemning "general warrants," this final provision also stated the requisites for valid warrants more forcefully than the draft's requirement that warrants not be "unsupported by evidence." The final provision forbade warrants unless they were based upon "evidence of a fact committed." Because "evidence" meant testimony given under oath, and "fact" was used as a synonym for a committed crime,³¹⁰ this "evidence of a fact committed" requirement called for sworn testimony that a crime had *actually* been committed—the common-

³⁰⁷ See *supra* notes 184-87, 228 and accompanying text.

³⁰⁸ See *supra* text accompanying note 31.

³⁰⁹ See DUMBAULD, *supra* note 62, at 172.

³¹⁰ See, e.g., 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 301 (noting that the date and township "in which the fact was committed" must be included in an indictment).

law crime-in-fact requirement discussed above.³¹¹ Thus, the Virginia Framers plainly did not adopt anything like the weaker “probable cause” standard that would later be used in the Fourth Amendment.³¹² Likewise, the Virginia warrant standard did not contain anything resembling the “reasonableness” standard now assigned to the Fourth Amendment.

d. Two search-and-seizure provisions. In sum, the Virginia declaration set out two provisions that dealt with what we now call search and seizure: the “law of the land” provision constituted the broad search-and-seizure provision which addressed the central search-and-seizure issue of English constitutional history by effectively banning arrests and pretrial imprisonment that did not conform to common-law standards. The ban against general warrants then set out a more focused prohibition against too-loose “general warrants” and employed the common-law crime-in-fact standard. That two-provision approach to search and seizure then served as a model for subsequent state declarations, including those of Maryland and North Carolina.

C. The 1776 Maryland Provisions

It is fairly evident that the search-and-seizure provisions adopted by Maryland in August, 1776 were derived from Virginia’s. The criminal procedure provisions in the Maryland Declaration of Rights track the odd inverted procedural order of the Virginia declaration by starting with trials and then moving to pretrial matters, but the Maryland Framers separated out the various protections more than Virginia had. In the Maryland declaration, Article 19 set out trial rights and Article 20 set out

³¹¹ See *supra* notes 152, 222, 239 and accompanying text and note 257. There is one perplexity—the language might be read to set slightly different standards for search and arrest warrants. Was it meant to apply the “fact committed” standard only to search warrants, but leave more room for justification for arrest warrants, as per Hawkins’s commentary (see *supra* nn. 233-36)? That seems doubtful, because the arrest warrant language refers to persons “whose offense” is not supported by evidence.

³¹² See *infra* notes 513-19 and accompanying text.

self-accusation.³¹³ Article 21 then set out a fuller paraphrase of Magna Carta 29 than had Virginia:

XXI. That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.³¹⁴

Because "taken or imprisoned" connoted arrested, this article meant, among other things, that no one could be legally arrested except in accordance with "the law of the land."

Next, Maryland's Article 22 prohibited excessive bail or punishment.³¹⁵ Then Article 23 set out a detailed ban against general warrants:

XXIII. That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants—to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special—are illegal, and ought not to be granted.³¹⁶

The Maryland Framers reserved the term "general warrants" for unparticularized warrants, but also condemned even a specific warrant issued "without oath or affirmation." Although the Maryland provision did not explicitly say what the oath had to be about, it seems highly likely that this provision

³¹³ See 4 STATE CONSTITUTIONS, *supra* note 62, at 372-75 (setting out the 1776 Maryland Declaration of Rights).

³¹⁴ See 4 *id.* at 373. Maryland also included, in Article XVII, a statement that every freeman was entitled to a remedy for any wrong.

³¹⁵ See 4 *id.* Like Virginia, the Maryland provision copied the language from the 1689 English Bill of Rights. See *supra* notes 296-99 and accompanying text.

³¹⁶ See 4 STATE CONSTITUTIONS, *supra* note 62, at 374. This provision appears to have been a reworking of the Virginia committee's draft warrant provision, rather than the final Virginia provision. Compare the language of the Virginia committee draft, *supra* text accompanying note 306 and the language of the final Virginia provisions, *supra* text accompanying note 309. The Virginia draft was widely circulated at the Continental Congress meeting in Philadelphia in the summer of 1776. See 1 THE PAPERS OF JAMES MADISON, *supra* note 287, at 171 (indicating that the Virginia committee draft for a declaration of rights was carried to the Second Continental Congress and printed in a Philadelphia newspaper). Thus, the draft probably exerted more influence on other states than the final Virginia declaration.

would have been understood to implicitly require an oath that complied with the common-law standard for issuing a warrant—that is, sworn testimony that a crime had been committed and specific grounds for suspecting a person or for suspecting the location of stolen goods.³¹⁷ Thus, the “oath or affirmation” requirement would appear to be equivalent to the Virginia committee draft’s “[s]upported by evidence” standard.³¹⁸

D. The 1776 North Carolina Provisions

North Carolina’s Framers also started from Virginia’s declaration, but unpacked the criminal procedure provisions into separate provisions.³¹⁹ Like Maryland’s, North Carolina’s Declaration of Rights included a fuller rendition of Magna Carta 29:

XII. That no freeman ought to be taken, imprisoned, disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land.³²⁰

Unlike the prior renditions of Magna Carta 29, this provision omitted the traditional but archaic reference to “the judgment of his peers” and referred only to “the law of the land.”

³¹⁷ See *supra* note 231.

³¹⁸ See *supra* text accompanying note 306.

³¹⁹ The North Carolina Declaration of Rights set out criminal trial evidence and self-accusation in article VII; added an explicit statement in article VIII “[t]hat no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment”; set out a unanimous jury verdict standard in article IX; banned excessive bail or punishment in article X; adopted the final version of Virginia’s ban against general warrants in article XI; and set out a “law of the land” provision in article XII, and adopted a guarantee of habeas corpus in article XIII (although it does not use that term). See 7 STATE CONSTITUTIONS, *supra* note 62, at 402-04 (setting out the 1776 North Carolina Declaration of Rights).

The North Carolina ban against general warrants appears to have been derived quite directly from the final Virginia warrant provision:

XI. That general warrants—whereby an officer or messenger may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons, not named, whose offences are not particularly described, and supported by evidence—are dangerous to liberty, and ought not to be granted.

See 7 STATE CONSTITUTIONS, *supra* note 62, at 402. Compare to the Virginia provision set out *supra* text accompanying note 306.

³²⁰ See 7 STATE CONSTITUTIONS, *supra* note 62, at 403.

Thus, it is apparent that this provision addressed pretrial protections, including arrest, rather than trial protections, and it seems highly probable that it was understood to constitutionalize common-law arrest standards. However, the language in some other state provisions was more problematic on the latter point.

*E. The 1776 Pennsylvania Provisions and
the 1777 Vermont Provisions*

The 1776 Pennsylvania Constitution was more radically democratic than those of the other states; hence its Framers may have been somewhat less concerned with controlling legislative power, and more inclined to extol the legislative power.³²¹ Thus, although the drafters of the Pennsylvania Declaration of Rights also began from the Virginia committee's draft,³²² they made several potentially significant adjustments in the criminal procedure provisions.

In particular, the paraphrase of Magna Carta 29 in the final clause in the Pennsylvania criminal procedure provision stated "nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers."³²³ The "deprived of liberty" language, which was taken directly from Virginia's committee draft, coupled with the omission of references to life or other property interests, indicates that this provision was focused on pretrial arrest and imprisonment.³²⁴

³²¹ See generally J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY* (1971).

³²² See *supra* note 316 (noting that the Virginia committee draft was widely circulated).

³²³ See 8 *STATE CONSTITUTIONS*, *supra* note 62, at 278-79 (art. IX). Comparison of the final language to Benjamin Franklin's draft of the Pennsylvania Declaration indicates that no change was made in this clause during the framing. See 22 *THE PAPERS OF BENJAMIN FRANKLIN* 529, 531-32 (William B. Willcox ed., 1982).

³²⁴ The focus on pretrial criminal procedure in the Pennsylvania law of the land clause is especially evident because an earlier clause in the same article had dealt with jury trial, as in the Virginia criminal procedure section. Additionally, the Pennsylvania declaration contained another provision that broadly stated the right to "the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." See 8 *STATE CONSTITUTIONS*, *supra* note 62, at 278 (art. I). Another provision also stated a right to "the enjoyment of life, liberty, and property" and included a takings clause of sorts: "no part of a man's property can be

However, the Pennsylvania provision required compliance with the "laws of the land," plural, rather than "law," singular, and in framing-era usage "laws" typically denoted statutes, while common law was denoted as "law."

It is difficult to assess how significant this textual difference was meant or understood to be. There was a clear understanding in 1776 that the legislature could define crimes, and it is likely that there was a growing sense that common-law definitions of crimes should be replaced by statutory codification.³²⁵ Thus, the use of "laws" in the Pennsylvania law of the land provision at least acknowledged legislative definitions of substantive crimes for which arrests could be made; the difficult question is whether it did more than that. On its face, the use of "laws" would seem to have left room for the legislature to alter criminal procedure standards, including arrest standards. There were instances in which colonial and early state statutes that created minor offenses such as blasphemy or vagrancy had also conferred warrantless arrest authority on peace officers regarding such offenses.³²⁶ However, as of 1776, statutes had neither codified nor altered felony warrantless arrest standards, which remained matters of common law.³²⁷ Additionally, the Pennsylvania legislature had used "laws of this province" in several early eighteenth-century provisions based on Magna Carta 29, when there was some dispute as to whether English common law applied to that colony. The use of "laws" in 1776 may have simply echoed those earlier texts.³²⁸ Hence, it is unclear whether the Pennsylvania use of "laws" was actually in-

justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives." See 8 *id.* at 278 (art. VIII).

³²⁵ Indeed, William Penn, the original proprietor of Pennsylvania, had earlier had his own run-in with unwritten judge-defined criminal offenses. See HOWARD, *supra* note 103, at 78-82 (discussing Penn's trial).

³²⁶ See the examples in Davies, *Arrest*, *supra* note 3, at 345-54.

³²⁷ See *supra* note 25.

³²⁸ See HOWARD, *supra* note 103, at 92-95 (discussing Pennsylvania provisions adopted in 1700, 1711, and 1715 and controversy over application of common law in colony).

tended to connote broad legislative authority to alter arrest law.³²⁹

Pennsylvania did not adopt a ban against excessive bail as Virginia had, but did adopt a ban against general warrants that appears to have been based on the Virginia committee's draft provision (rather than the final Virginia provision).³³⁰ However, Pennsylvania added the following italicized preamble articulating a "right" of "the people":

X. *That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person, or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.*³³¹

There is no indication that this invocation of the right of the people regarding "search or seizure" at the start of this provision was meant to broaden this provision to reach warrantless arrests or searches—especially given that the earlier "laws of the land" provision had addressed arrest. Rather, this language appears to simply reflect a rhetorical style adopted by the Pennsylvania drafters. Perhaps because of its democratic bent, the Pennsylvania declaration included an unusual number of provisions that began with a statement of a "right of the people" that "therefore" required some particular rule, standard, or prohibition.³³²

³²⁹ As I describe below, the Pennsylvania Antifederalists at that state's 1788 ratification convention later rejected the "laws" formulation and instead proposed a federal "law of the land" protection. See *infra* notes 416-17 and accompanying text.

³³⁰ See *supra* note 316 (noting that the Virginia committee draft was circulated in Philadelphia).

³³¹ See 8 STATE CONSTITUTIONS, *supra* note 62, at 279. The language after "therefore" is from the Virginia committee draft and, like that draft, does not use the term "general warrant." See *supra* text accompanying note 306. I have also discussed this provision in Davies, *supra* note 2, at 677-84.

³³² See Davies, *supra* note 2, at 679-80. There are some indications that the preamble statement of a right of the people was added late during the deliberations. See *id.* at 677 n.355.

The statement of the right in this provision was peculiar, however, insofar as it appeared to state an *unqualified* right against search or seizure; note the absence of “unreasonable” or any other qualifying adjective in the right to be “free from search or seizure.” Yet, the drafters plainly did not intend to create an absolute right because they went on to identify the standards for assessing arrest and search warrants. Hence, the invocation of the right appears to have been a somewhat overstated rhetorical device.

It is possible, however, that the persons-houses-papers-posessions formula may also have served a practical purpose: namely, it defined the boundary of right in a way that corresponded with the common-law protection of the house and its contents but omitted ships, which were “personalities” under the civil law of admiralty—a significant consideration in a state that had the largest port in North America and a strong interest in effective customs collections.³³³

The warrant standard set out in the Pennsylvania provision, testimony “affording sufficient foundation,” appears to have been comparable to the “[s]upported by evidence” standard in the Virginia committee draft (the Pennsylvania Framers may not have been aware of the use of “evidence of a fact committed” in the final Virginia declaration).³³⁴ The change in language regarding cause for a warrant may have simply been a by-product of the revision to recognize that grounds for a warrant could be stated by “affirmation” as well as by “oath” (the typical requirement for legal “evidence”).³³⁵

In 1777, Vermont acted as a separate state even though its neighbors had yet to recognize it as such. Because Vermont seems to have embraced the radically democratic outlook of the 1776 Pennsylvania Constitution, it used the Pennsylvania declaration as a model for its own 1777 constitution.³³⁶ Thus it also

³³³ See *id.* at 680-83.

³³⁴ See *supra* note 316 (noting that the Virginia committee draft was circulated at the Second Continental Congress which met in Philadelphia).

³³⁵ See *supra* note 147.

³³⁶ See THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 201-02 (Patrick T. Conley and John P. Kaminski eds., 1992).

adopted both the Pennsylvania criminal procedure provision which forbade deprivation of "liberty, except by the laws [plural] of the land or the judgment of his peers,"³³⁷ and the Pennsylvania ban against too-loose warrants, including the preamble stating an unqualified "right" of the people "to hold themselves, their houses, papers and possessions free from search or seizure."³³⁸

F. States that Did Not Adopt Two Search-and-Seizure Provisions

The Virginia model of two search-and-seizure provisions was not always followed. In 1776, Delaware adopted a declaration of rights that generally included the rights set out in the Virginia section on criminal procedure,³³⁹ as well as a ban against too-loose warrants.³⁴⁰ However, Delaware omitted any direct paraphrase of the "law of the land" provision in Magna Carta 29; instead, the Delaware declaration stated that its citizens had an affirmative right to "enjoyment of life, liberty, and property" (a phrasing that may have reflected Blackstone's rendition of Magna Carta 29).³⁴¹ While that phrasing could be con-

³³⁷ See 9 STATE CONSTITUTIONS, *supra* note 62, at 487, 490 (art. X).

³³⁸ See 9 *id.* at 490 (art. XI).

³³⁹ See 2 *id.* at 197-98 (see especially arts. 13 (trial by jury), 14 (notice of charge, right to counsel, right to confrontation, right to present witnesses, right to speedy trial, impartial jury, and unanimous verdict), 15 (right against compelled self-accusation), and 16 (prohibition against excessive bail, fines, or punishment)).

³⁴⁰ See 2 *id.* at 199 (art. 17). The Delaware warrant provision closely tracked that of Maryland. Compare 4 *id.* at 374 (Md. art. XXIII).

³⁴¹ The relevant Delaware provision read:

10. That every Member of Society hath a Right to be protected in the Enjoyment of Life, Liberty and Property; and therefore is bound to contribute his Proportion towards the Expense of that Protection, and yield his personal Service when necessary, or an Equivalent thereto; but no Part of a Man's Property can be justly taken from him, or applied to public Uses without his own Consent or that of his legal Representatives; Nor can any Man that is conscientiously scrupulous of bearing Arms in any Case be justly compelled thereto if he will pay such Equivalent.

See 2 STATE CONSTITUTIONS, *supra* note 62, at 198. This provision also appears in the 1776 Pennsylvania Constitution. See 8 *id.* at 278 (art. VII). It probably cannot be determined which of these neighboring states first drafted this provision, although it is apparent that the final Pennsylvania text reflects a further development from that which appears in Benjamin Franklin's interim draft of the Pennsylvania declaration. See 22 THE PAPERS OF BENJAMIN FRANKLIN, *supra* note 323, at 531 (draft art. 8).

strued to include a right not to be arrested except in accordance with common-law standards, it hardly called attention to arrest.

Several of the original states did not adopt declarations of rights. For example, Connecticut did not adopt a new constitution after independence, but instead continued to operate under the provisions of its colonial charter. However, in 1776 Connecticut did adopt a brief "Constitutional Ordinance" that included a paraphrase of Magna Carta 29, but with a twist: that "No Man's Person shall be arrested [or] restrained . . . unless clearly warranted by the Laws of this State."³⁴² The use of "arrested [or] restrained" in this provision in the place of the traditional "taken or imprisoned" confirms that prohibiting arbitrary arrests remained a salient concern. However, like Pennsylvania, Connecticut only required that "arrest[s]" be authorized

It is possible that this provision was meant to state Magna Carta 29 broadly and positively in terms of enjoyment of life, liberty, and property, rather than negatively in terms of prohibiting denial of these enjoyments. In particular, the phrasing may have been inspired by Blackstone's summary of Magna Carta 29, which he described as "protecting" the "enjoyment" of life, liberty and property:

And, lastly, (which alone would have merited the title that it bears, of the *great* charter,) [Magna Carta] protected every individual of the nation in the free *enjoyment of his life, his liberty, and his property*, unless declared to be forfeited by the judgment of his peers or the law of the land.

4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 417 (emphasis added).

³⁴² The relevant paragraph read:

2. . . . That no Man's Life shall be taken away: No Man's Honor or good Name shall be stained: No Man's Person shall be arrested, restrained, banished, dismembered, nor any Ways punished: No Man shall be deprived of his Wife or Children: No Man's Goods or Estate shall be taken away from him, nor any Ways indamaged under the Colour of Law, or Countenance of Authority; unless clearly warranted by the Laws of this State.

See 2 STATE CONSTITUTIONS, *supra* note 62, at 143. There was a precedent: Connecticut had earlier prefaced its colonial code with "a portion of Magna Carta." See MOTT, *supra* note 91, at 95 n.36 and accompanying text. Compare this language to the earlier text of the 1641 Massachusetts Body of Liberties, set out *infra* note 359.

The 1776 Connecticut Ordinance also set out an explicit recognition of the right to bail—subject to legislative revision:

4. And that no Man's Person shall be restrained, or imprisoned, by any authority whatsoever, before the Law hath sentenced him thereunto, if he can and will give sufficient Security, Bail, or Mainprize for his Appearance and good Behaviour in the mean Time, unless it be for Capital Crimes, Contempt in open Court, or in such Cases wherein some express Law doth allow of, or order the same.

See 2 STATE CONSTITUTIONS, *supra* note 62, at 143.

by the "Laws of this State." The plural "Laws" which connoted statutes may have implied some legislative authority to set arrest standards, but like Pennsylvania, Connecticut had also used "laws" in earlier colonial provisions based on Magna Carta 29.³⁴³ Connecticut did not adopt any warrant provision.

New Jersey adopted a constitution in 1776, but did not adopt a declaration of rights and did not include any law of the land provision in the constitution. Instead, the New Jersey Constitution provided for a continuation of common law unless altered by the legislature.³⁴⁴ New Jersey did not adopt any provision regarding warrants. The only right explicitly placed beyond the legislature's control was the right to trial by jury.³⁴⁵

New York adopted its initial constitution in 1777. It did not adopt a declaration of rights at that time, but did include a provision for a continuation of common law, subject to legislative alteration.³⁴⁶ In addition, the 1777 New York Constitution also

³⁴³ The Connecticut use of "Laws" likely had specific roots in early attempts in the New England colonies to codify definitions of criminal offenses so as to curb the discretion of the magistrates to define new offenses. See, e.g., SOURCES, *supra* note 104, at 143-47. Note, however, that these authors concluded that these early controversies arose when there was little legal learning in the colonies and that, subsequently, "the common law of England, especially Magna Carta, came more and more to be considered as the main source of the liberties of the subject." *Id.* at 146.

³⁴⁴ See 6 STATE CONSTITUTIONS, *supra* note 62, at 449-53 (setting out the New Jersey Constitution of 1776). The continuation of common law was provided for in article XXII. See 6 *id.* at 452.

³⁴⁵ See 6 *id.* at 452 (art. XXII) (stating, in relevant part, "that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever"). An earlier provision, which appears to be the only other criminal procedure provision, provided: "XVI. That all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to." See 6 *id.* This would appear to address the features of trial by jury that were still not firmly settled by common law; thus, it appears to be another example of the American Framers focusing on the unsettled aspects of common law. See *supra* text accompanying notes 28-34.

³⁴⁶ See 7 STATE CONSTITUTIONS, *supra* note 62, at 168, 177 (art. XXXV) (providing for the continuation of "such parts of the common law of England, and of the statute law of England and Great Britain" that were included in the law of the colony of New York on April 19, 1775 [the date of the Battle of Lexington], subject to legislative revisions). This constitution also provided that "trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever," and banned future "acts of attainder." See 7 *id.* at 179 (art. XLI). It also expressly provided for defense counsel in criminal cases brought on indictment. See 7 *id.* at 177 (art. XXXIV). Note that the latter provision reflects an expectation of continued use of grand jury indictments, even though there was no express provision regarding grand jury indictment.

included a provision that drew upon Magna Carta 29 by prohibiting deprivation of "rights or privileges secured" by the state constitution except according to "the law of the land."³⁴⁷ However, that phrasing did not use the traditional "taken or imprisoned" language and thus does not appear to have constitutionalized arrest standards. New York did not adopt any warrant provision.

South Carolina did not initially adopt any rights provisions, but it added a traditional paraphrase of Magna Carta 29, using the traditional "taken, or imprisoned" phrasing, when it revised its constitution in 1778.³⁴⁸ However, it did not adopt a ban against general warrants.

Georgia also did not adopt a declaration of rights in its 1776 constitution. However, it did adopt several provisions that were related to pretrial criminal procedure, including one which set minimum sizes for grand juries (thus implying continued use of indictments),³⁴⁹ one which banned excessive bail or punishment,³⁵⁰ and one that stated that "the principles of the *habeas corpus* act shall be a part of this constitution."³⁵¹ Because *habeas corpus* was used to enforce common-law arrest and impris-

³⁴⁷ This provision read:

XIII. . . . that no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers.

See 7 STATE CONSTITUTIONS, *supra* note 62, at 175 (art. XIII). The records of the New York convention in 1777 indicate that the initial proposal was for a provision prohibiting the disenfranchisement of persons "unless by act of the legislature of this state." See MOTT, *supra* note 91, at 169-70, n.11 (citing 1 C.Z. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 522 (1906)). However, that proposal was amended to read "No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this State by this Constitution, unless by law of the land, or the judgment of his peers." *Id.*

³⁴⁸ See 8 STATE CONSTITUTIONS, *supra* note 62, at 468, 475 (art. XLI):

XLI. That no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land.

This provision was repeated in the South Carolina Constitution of 1790. See 8 *id.* at 476, 481 (art. IX, sec. 2).

³⁴⁹ See 2 *id.* at 443, 448 (art. XLV).

³⁵⁰ See 2 *id.* at 449 (art. LIX).

³⁵¹ See 2 *id.* at 449 (art. LX).

onment standards, this latter provision would seem to rest on the implicit premise of a settled standard for lawful arrests and commitments to jail to await trial;³⁵² hence, this provision likely would have been understood to imply a continuation of common-law arrest standards. Georgia did not adopt any provision that explicitly addressed warrants.

G. The 1780 Massachusetts Provisions

The framing of a state constitution took longer in Massachusetts than in other states because the Massachusetts legislature submitted a proposed constitution to the people for ratification in 1778, and it was rejected. The rejection was based, in substantial measure, on the omission of a declaration of rights.³⁵³ Massachusetts tried again with another constitutional convention in 1779, and the constitution and declaration of rights then proposed was adopted in 1780. John Adams was the principal drafter.³⁵⁴ Adams obviously used the Virginia criminal procedure provisions as a starting point when he drafted the comparable Massachusetts provisions, but he elaborated to make the meaning of the provisions plainer and more complete.³⁵⁵ Like the Virginia declaration, Adams drafted two provisions that dealt with search-and-seizure topics: a "law of the land" provision, and a ban against general warrants.

³⁵² See *infra* note 406.

³⁵³ RONALD M. PETERS, JR., *THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT* 18-19 (1974) (noting that "the largest number of objections [to the 1778 proposed constitution] was lodged on the grounds that the plan contained no bill of rights.").

³⁵⁴ *Id.* at 20-21. Peters notes that "[l]ittle is known of the deliberations" of the committee charged with the drafting, and that "Adams's original draft was not preserved, and the only evidence of the committee's activities is the proposal which they eventually laid before the Convention." *Id.*

³⁵⁵ *Id.* at 14:

Adams's prolixity was an undisguised blessing. The [Massachusetts] Constitution [of 1780] stands in sharp contrast to the Federal Constitution of 1787, by virtue of the depth of its exposition. Where the Federal Constitution settles for a word or a phrase, the Massachusetts Constitution takes up a sentence or even a paragraph . . . Adams chose to develop in his draft of the Massachusetts Constitution the reasoning behind many of its provisions . . . It is this very attention to explanation, as well as the classic form and completeness of the Massachusetts Constitution, that distinguishes it among the other American constitutions . . .

1. The Massachusetts “Law of the Land” Provision

Adams’s “law of the land” provision is of particular importance, because he made the meaning of that provision more explicit by substituting the word “arrested” for the more traditional “taken”:

XII. No subject shall be held to answer for any crimes or no offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favourable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel at his election. *And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.*

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.³⁵⁶

The italicized language makes it clear that the “law of the land” provision addressed arrests.

Like the earlier provisions, that language does not explicitly indicate whether that clause was meant to constitutionalize common-law arrest standards. However, there is some evidence that common-law protections were discussed prior to the drafting of the 1780 constitution.³⁵⁷ Additionally, there is no doubt

³⁵⁶ See 5 STATE CONSTITUTIONS, *supra* note 62, at 92, 94 (art. XII) (emphasis added).

³⁵⁷ For example, in late 1778, when people in Massachusetts were discussing the adoption of a state constitution and declaration of rights, a Boston newspaper published an article that quoted a speech that a Georgia Tory had made to a grand jury in that state that was considering whether to indict him for refusal to swear allegiance to the new state government. The former Tory invoked the common-law arrest requirement of an oath by an accuser as follows:

That nothing can be more alarming, than the establishing of a power to take away liberty and property out of the usual and due course of Law, by a power distinct from and in opposition to the only legal and constitutional judiciary department . . . If a man be taken up without any previous accusation upon oath, all liberty is at an end. If a man may be condemned without any public trial, or presence of violation of a law, all law is at an end. . .

that Adams was well aware of Coke's explication of the "law of the land" guarantee of Magna Carta 29.³⁵⁸ The fact that the second paragraph of this provision explicitly recognized legislative authority to define the substance of criminal offenses, but that there was no reference to legislation in the first paragraph, also suggests that the earlier paragraph invoked common-law standards. Additionally, it is noteworthy that Adams used the term "law of the land" in the paraphrase of Magna Carta 29 in contrast to earlier Massachusetts colonial declarations that had referred to "laws" (statutes).³⁵⁹ Taken in combination, these features suggest that Adams and the other 1780 Massachusetts Framers meant to incorporate common-law pretrial criminal procedure.

2. The Massachusetts Warrant Provision

Adams also included a detailed ban against general warrants, which is notable for introducing "unreasonable" into the search-and-seizure lexicon—that term had not appeared in any of the six earlier state provisions that banned general warrants:

PETERS, *supra* note 353, at 161 (quoting an article published in the *Continental Journal* on November 27, 1778).

³⁵⁸ See, e.g., HOWARD, *supra* note 103, at 156-64 (noting that "[t]hroughout his legal career, Adams was to be steeped . . . in Magna Carta" and that Coke's works were "well represented in Adams's library," and also recounting Adams's citations to Coke's chapter on Magna Carta 29 during his representation of John Hancock during the latter's smuggling trial in the Boston vice-admiralty court in 1768-1769).

³⁵⁹ There was precedent for the Massachusetts "law of the land provision" of 1780 in the Massachusetts Body of Liberties of 1641. See 5 STATE CONSTITUTIONS, *supra* note 62, at 12 (identifying document 7 as the 1641 Body of Liberties); 5 *id.* at 46-67 (setting out the Body of Liberties). The relevant article reads:

1. No mans life shall be taken away, no mans honor or good name shall be stayned, no mans person shall be arrested, restrayned, banished, dismembred, nor any wayes punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indamaged under colour of law or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published, or in case of the defect of a law in any particuler case by the word of God. And in Capitall cases, or in cases concerning dismembring or banishment according to that word to be judged by the Generall Court.

See 5 *id.* at 46-47 (art. 1).

Art. XIV. Every subject has a right to be secure from *all unreasonable searches and seizures* of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause of foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.³⁶⁰

Why did Adams incorporate the Pennsylvania preamble? The most likely reason is that he liked the rhetorical style of stating the larger purpose of the ban against general warrants.³⁶¹ Additionally, it is possible that he recognized that it was useful to define the scope of the warrant protection to reach common-law interests associated with the “houses,”³⁶² but exclude ships because Boston, like Philadelphia, was a major port for international shipping, and customs collections would be an important source of government revenue.³⁶³

However, Adams was too good a lawyer to have overlooked the absolutist tone of the right asserted in the Pennsylvania preamble,³⁶⁴ so he added the qualifier “*unreasonable*” searches and seizures. How did Adams understand “unreasonable searches and seizures”?

There is no indication that Adams intended the preamble to create a free-standing, comprehensive search and arrest standard along the lines of the modern construction of the first

³⁶⁰ See 5 *id.* at 95 (art. XIV) (emphasis added).

³⁶¹ See *supra* note 355.

³⁶² It should be noted that Adams referred to a subject’s “houses” (plural). I overlooked that in my previous discussion. See Davies, *supra* note 2, at 684 (incorrectly quoting the provision as “his house,” rather than as “his houses”). Adams’s use of the plural may indicate that he used the term “houses” to refer generally to buildings, and thus may have extended the protection to warehouses as well as residences. The common-law “privilege of house” appears to have applied to residences, but there is some ambiguity as to whether the term “houses” in this provision referred only to residences, to residences plus related out-buildings, or to any buildings. See also Davies, *supra* note 2, at 680-83.

³⁶³ See Davies, *supra* note 2, at 681 n.369.

³⁶⁴ See *supra* text following note 332.

clause of the Fourth Amendment. Adams's draft was noteworthy for being more detailed and concrete than the earlier state declarations, yet the operative language in this provision dealt exclusively with warrants, and the preamble reference to "unreasonable searches and seizures" was linked to these specific standards with a "therefore." Moreover, because the remainder of this provision set out the specific standards for warrants, and because the earlier "law of the land" provision addressed warrantless arrest, there was no role for a free-standing "reasonableness" standard to play.

Instead, it is highly probable that Adams simply used "unreasonable searches and seizures" as a pejorative label for searches or seizures conducted under general warrants.³⁶⁵ In the late eighteenth century, common law was viewed as the perfection of reason,³⁶⁶ hence, at least when used in a legal context, "unreasonable" connoted a gross violation of a fundamental legal principle. For example, that is how Coke had used "against reason" in his famous ruling on the invalidity of a statute in *Dr. Bonham's Case*.³⁶⁷ Thus, to say that general warrants were "unreasonable" was to say that they were so illegal that even legislation could not authorize them. "Unreasonable searches and seizures" was a fitting pejorative label for the gross illegality of searches under general warrants.

Indeed, Adams did not have to look far for a precedent. During the 1761 *Writs of Assistance Case*, Adams's mentor, James Otis, had quoted Coke's statement in *Dr. Bonham's Case* when Otis asserted that any statute that authorized general writs of assistance would be "against common right and reason" and "void"—and Adams had personally recorded Otis's argu-

³⁶⁵ I have previously discussed this point in somewhat greater detail. See Davies, *supra* note 2, at 684-93.

³⁶⁶ See e.g., 2 COKE, *supra* note 13, at 179 (treating common law as the perfection of reason).

³⁶⁷ 8 Coke Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (C.P. 1610) (ruling that "the common law will controul Acts of Parliament" and that a statute that was "against common right and reason" was "void"). Discussing that ruling, Blackstone later updated "against reason" to "unreasonable." See 1 BLACKSTONE (1st ed. 1765), *supra* note 135, at 91. See also Davies, *supra* note 2, at 698 n.398 (noting that John Locke also replaced Coke's "against reason" with "unreasonable").

ment on that occasion.³⁶⁸ Moreover, Adams was well versed in Coke's writings himself and later cited Coke's "against reason" when he, along with Otis, argued that the Stamp Act was void.³⁶⁹ In the intervening years, Blackstone had updated Coke's "against reason" to "unreasonable,"³⁷⁰ and Adams did likewise when he drafted the Massachusetts Declaration of Rights.

There is an additional possible influence along the same lines. As noted above, some of the common-law authorities sometimes stated the requirements for criminal search or arrest in terms of (1) a sworn assertion that a felony had been committed in fact and (2) "reasonable" or "probable" cause to suspect a particular place or person.³⁷¹ Thus, the pejorative "unreasonable" would also have connoted that general warrants lacked the requisite demonstration of individualized cause for an arrest or search warrant. In this context, Adams likely was also aware that Coke had condemned an arrest not based on a charge of a specific crime as "without reason" (and that Blackstone had also updated that passage to "unreasonable").³⁷² Thus, John Adams would have understood that "unreasonable" denoted a violation of basic principle and would also have appreciated that that term was specifically appropriate for condemning general warrants. Hence, although John Adams introduced the term "unreasonable searches and seizures," he was not the father of the Fourth Amendment reasonableness standard.

It is also worth noting that Adams did not adopt Virginia's "evidence of a fact committed" standard,³⁷³ but instead forbade issuance of warrants "if the cause or foundation of them be not previously supported by oath or affirmation." This formulation clearly required a sworn (or affirmed) statement of cause for

³⁶⁸ See Davies, *supra* note 2, at 680-91. Otis expressed this same notion when he later argued that "acts [that is, parliamentary statutes] against the fundamental principles of the British constitution are void" because "it is contrary to reason that the supreme power should have the right to alter the constitution." MOTT, *supra* note 91, at 127 n.14 (quoting JAMES OTIS, *THE RIGHTS OF BRITISH COLONISTS ASSERTED AND PROVED* (3d ed. 1776)). As a protege of Otis, Adams would also have been familiar with Otis's argument.

³⁶⁹ See Davies, *supra* note 2, at 691, n.414.

³⁷⁰ See *supra* note 260.

³⁷¹ See *supra* note 232.

³⁷² See *supra* note 178 and accompanying text.

³⁷³ See *supra* note 309.

issuance of a warrant, but did not attempt to specify precisely what level of cause had to be shown. I speculate that Adams was too good a lawyer to ignore the point that different kinds of warrants called for different kinds of cause. As noted above, framing-era legal authorities indicated that while a theft-in-fact was still a requisite for a search warrant for stolen goods, a felony-in-fact may not have been strictly necessary for a felony arrest warrant.³⁷⁴ Additionally, the Virginia "evidence of a fact committed" standard would not have been a practical standard for customs search warrants in particular—there often was no complainant in such cases, so requiring a sworn allegation of crime-in-fact might have obstructed issuance of customs search warrants.³⁷⁵ Thus, Adams's formulation appears to have left some room to recognize that different cause standards would be applicable depending on the nature of the warrant.

Adams also added a novel final passage to the warrant provision requiring that issuance of warrants comply with the "laws"—that is, with statutes. This provision appears to recognize that the *purposes* for which warrants could be issued was a proper subject for legislation.³⁷⁶ The juxtaposition of that statement regarding statutory authority for the uses of warrants with the earlier standard of "adequate cause or foundation supported by oath" suggests that the "cause or foundation" was set by common-law standards—that is, Adams did not simply write that warrants could be issued on the basis of "such cause as required by the laws." Thus, Adams's provision appears to indicate that valid warrants had to satisfy both common-law standards of cause and particularity and statutory standards regarding authorized purposes.

³⁷⁴ See *supra* notes 232-34 and accompanying text.

³⁷⁵ "Probable cause" had emerged as the standard for customs search warrants. See *infra* notes 513-17 and accompanying text.

³⁷⁶ I have previously speculated that this clause may have been prompted by Lord Camden's earlier statement that warrants could be issued only for purposes recognized in the "law books." See Davies, *supra* note 2, at 684 n.381.

H. The 1784 New Hampshire Provisions

New Hampshire copied the two Massachusetts search-and-seizure provisions when it adopted a declaration of rights in 1784. In particular, it followed the Massachusetts “law of the land” formulation by explicitly including the term “arrested.”³⁷⁷ Additionally, it also included a right against “unreasonable searches and seizures” in the preamble to the ban against general warrants.³⁷⁸

Although the New Hampshire provisions were not distinctive, they are noteworthy insofar as they were the subject of one of the few post-framing judicial constructions of the relative contents of the two search-and-seizure provisions. The 1817 case *Mayo v. Wilson*³⁷⁹ involved a challenge to the constitutionality of a recently enacted state statute that prohibited unnecessary travel on the Sabbath and authorized parish officers to detain violators. The plaintiff, who had been detained under the statute, asserted that the statute was unconstitutional.³⁸⁰ Notably, the state supreme court analyzed the statute’s constitutionality under the state “law of the land” provision, which the judges

³⁷⁷ See 6 STATE CONSTITUTIONS, *supra* note 62, at 344, 346:

XV. No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favourable to himself; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, and counsel. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

³⁷⁸ See 6 *id.* at 346:

Art. XIX. Every subject hath a right to be secure from all unreasonable search and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath, or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

³⁷⁹ 1 N.H. 53 (1817).

³⁸⁰ *Id.* at 54.

characterized as being "a literal translation from *Magna Carta*, c. 29"³⁸¹ and the equivalent of a "due process of law" provision.³⁸²

In the due process of law analysis, the judges treated the detention as an arrest³⁸³ and reviewed the treatment of common-law standards for warrantless arrests set out in Sullivan's treatise,³⁸⁴ while noting that "Coke in his commentary upon *Magna Carta*, gives the same explanation" of arrest authority.³⁸⁵ However, the judges then jumped past the question whether the "law of the land" provision had constitutionalized the common-law standards they had just discussed and instead simply asserted that any arrest that was authorized by statute was constitutional—thus they completely ignored the common-law limitations on warrantless arrests that they had just summarized.³⁸⁶

Although *Mayo* is hardly a shining example of an independent judiciary at work, it does show that the New Hampshire judges understood that arrest was addressed in the state law of the land provision. Toward the end of their opinion, they brushed aside the relevance of the New Hampshire warrant provision by asserting that the provision "does not seem intended to restrain the legislature from authorizing arrests with-

³⁸¹ *Id.* at 55.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.* at 56. Sullivan's discussion of the law of arrest included in "the law of the land" is set out *supra* note 257.

³⁸⁵ 1 N.H. at 56.

³⁸⁶ After reviewing the common-law standards set out by Sullivan and Coke, the judges begged the important issue by simply asserting:

[i]t seems clear that an arrest if authorized by the statute or common law, though without writ or warrant in deed, has always been considered in *England* as warranted *per legem terrae*, by due process of law, within the meaning of *magna carta*, and we have no doubt, that any arrest here authorized by our common or statute law must be considered an arrest by the land of the land, by due process, within the meaning of our constitution. We think that the 15th article in our bill of rights, was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests not warranted by law.

Id. at 57. The judges then launched into an essay on the validity of legislative law making, but never mentioned the important question of whether a declaration of rights was meant to limit legislative power. *Id.* at 57-59.

out warrant, but to guard against the abuse of warrants issued by magistrates.”³⁸⁷

I. New York's Shift to "Due Process of Law"

One further state declaration of rights was adopted prior to the framing of the Federal Bill of Rights when New York adopted a statutory bill of rights in 1787.³⁸⁸ That enactment made a significant alteration in terminology when it substituted “due process of law” for the traditional “law of the land” in paraphrasing Magna Carta 29. The story of how that change came about sheds some light on how “due process of law” was understood only two years before the framing of the Federal Bill of Rights.

As noted above, New York had not adopted a declaration of rights when it initially adopted a state constitution in 1777, but had included a provision in the constitution itself that set out a variant on Magna Carta 29:

XIII . . . that no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers.³⁸⁹

This provision became the subject of a constitutional controversy in the aftermath of the Revolutionary War.

1. The Contested Interpretation of “Law of the Land”

Because New York City had been occupied by the British army for virtually the entire Revolutionary War, many of the inhabitants of the city had remained Loyalists or neutrals and had been spared much of the hardship of the war. Unsurprisingly, citizens from other parts of the state were resentful of the

³⁸⁷ *Id.* at 60.

³⁸⁸ See Laws of the State of New York, passed by the Legislature at their 10th Sess. (Chapter 1, An Act concerning the rights of the citizens of this State, passed January 26, 1787); reprinted in 2 New York Laws 1. Unfortunately, this statutory declaration of rights does not seem to be included in most of the compilations of state constitutions. The most accessible source is COMPLETE BILL, *supra* note 62, at 353 (entry 10.1.3.6.c).

³⁸⁹ See *supra* note 347 and accompanying text.

former Tories, and the more radical elements in the legislature sought to disenfranchise and disappropriate wealthy former Tories in New York City.³⁹⁰

Alexander Hamilton, who counted former Tories among the clients of his law practice,³⁹¹ and who led the more conservative faction in the legislature, opposed the punitive legislation. When the radical faction sought to enact statutes that would strip former Tories of rights or property, the Hamiltonian faction asserted that such legislation would violate the "law of the land" guarantee of the 1777 state constitution.³⁹² However, the radical faction responded that a statute passed by the legislature would constitute a "law of the land," so the 1777 provision could not bar the proposed punitive legislation.³⁹³

Hamilton disputed that interpretation in a 1784 pamphlet in which he quoted Coke and asserted that the 1777 "law of the land" guarantee meant that no one could be deprived of their rights except by "due process of law" in the form of a valid criminal prosecution and conviction:

The thirteenth article of the [1777 New York] Constitution declares, "that no member of the State shall be *disenfranchised, or defrauded of any of the rights or privileges* sacred to the subjects of this State by the Constitution, unless *by the law of the land or the judgment of his peers*." If we inquire what is meant by the law of the land, the best commentators will tell us, that it means *due process of law; that is by indictment or presentment of good and lawful men*[*] and trial and conviction in consequence.³⁹⁴

³⁹⁰ See, e.g., 1 LAW PRACTICE OF ALEXANDER HAMILTON 197-223 (Julius Goebel, Jr. ed., 1964) (discussing the post-Revolutionary War situation in New York and punitive legislation aimed at former Loyalists, including the 1779 "Confiscation Act," the 1782 "Citation Act," and the 1783 "Trespass Act").

³⁹¹ See Davies, *Arrest*, *supra* note 3, at 409, n.574.

³⁹² See MOTT, *supra* note 91, at 140-41 n.64.

³⁹³ See Davies, *Arrest*, *supra* note 3, at 409, n.575. Note that this interpretation harkened back to the earlier debate during the 1777 New York Constitutional Convention, discussed *supra* note 347.

³⁹⁴ Alexander Hamilton, Letter 1, Letters from Phocion (1784), in 4 THE WORKS OF ALEXANDER HAMILTON 230, 231-32 (Henry Cabot Lodge ed., 1904). This 1784 pamphlet was one of several that Hamilton wrote in opposition to the move to "disenfranchise" former Tories by statute. [In the reprinted version cited, a footnote appears at the asterisk in the quoted passage that cites "Coke upon Magna Carta, chap. 29, page 50"—that

Thus, Hamilton defined both “law of the land” and “due process of law” to refer to the requisites for initiating a valid criminal prosecution. However, he specifically invoked “due process of law” because that was still a term of art that was used virtually only as Coke had used it, and thus was not susceptible to being interpreted as a reference to statutory law.³⁹⁵

2. The 1787 Statutory Declaration of Rights

In January 1787, the Hamiltonian faction in the legislature succeeded in enacting a statutory declaration of rights which substituted “due process of law” for the previous “law of the land” terminology. After an opening provision that declared that all authority in New York had to be derived from the people of the state, the 1787 declaration of rights set out four criminal procedure provisions (numbered “Second” through “Fifth”) that clearly drew upon Magna Carta 29.

The initial criminal justice provision (numbered the “Second”) was a straightforward paraphrase of Magna Carta 29 that departed from those adopted by other states only insofar as it used “due process of law” where the other state provisions had used “law of the land”:

*Second, That no Citizen of this state shall be taken or imprisoned, or be disseised of his or her Freehold, or Liberties, or Free-Customs; or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful Judgment of his or her Peers, or by due Process of Law.*³⁹⁶

is, the chapter on Magna Carta in Coke’s *Second Institute*. I suspect that this footnote was added by Lodge when he edited Hamilton’s papers, but I have not had access to an original copy of Hamilton’s pamphlet.]

After the passage cited, Hamilton went on to argue that even the use of parliamentary bills of attainder for high treason in England had been limited to named individuals, not whole classes of persons. He concluded that the New York Constitution prohibited disenfranchisement except upon “trial and conviction of offences known by laws previously established, declaring the offence and prescribing the penalty” and commented that “[t]his is a dictate of natural justice, and a fundamental principle of law and liberty.” *Id.* at 232.

³⁹⁵ See *supra* note 246 and accompanying text.

³⁹⁶ See COMPLETE BILL, *supra* note 62, at 353 (entry 10.1.3.6.c) (emphasis added).

The next three provisions then set out further variations on Magna Carta 29 that do not seem to have been modeled on any of the prior state declarations. Although these provisions may initially appear to be rather abstract or even redundant, closer inspection suggests that each was meant to address a specific procedural stage in a criminal prosecution. The next provision (numbered the "Third") dealt specifically with arrest and imprisonment:

*Third, That no Citizen of this State shall be taken or imprisoned for any Offence upon Petition or Suggestion, unless it be by indictment or Presentment of good and lawful Men of the same Neighborhood where such Deeds be done, in due Manner, or by due Process of Law.*³⁹⁷

Notably, this provision required that arrest (a person being "taken or imprisoned") either be based on a valid indictment or otherwise comport with "due Process of Law." Significantly, this provision omitted any reference to "lawful judgment of his peers."

The next provision (numbered the "Fourth") then specified that no one could be tried ("put to answer") except upon a valid criminal charge.³⁹⁸ Then the final criminal procedure provision (numbered the "Fifth") stated that no person could be subjected to any criminal punishment unless they were "brought" to trial by "due Process of Law," and subsequently convicted in accordance with "due Course of Law":

Fifth, That no Person, of what Estate or Condition soever, shall be taken, or imprisoned, or disinherited, or put to death, without being brought to answer by due Process of Law; and that no Person shall be put out of his or her Franchise or Freehold, or lose his or her Life or Limb, or Goods and Chattels, unless he or she be duly brought to answer, and be fore-

³⁹⁷ See *id.* (emphasis added).

³⁹⁸ *Fourth, That no Person shall be put to answer without Presentment before Justices, or Matter of Record, or due Process of Law, according to the Law of the Land; and if any Thing be done to the Contrary, it shall be void in Law, and holden for Error.* See *id.* Note that this provision uses "Law of the Land" to refer generally to the law of the state, presumably including statutes, and thus gives that term a broader meaning than "due Process of Law" itself.

judged of the same, by *due Course of Law*; and if any Thing be done to the Contrary, it shall be void in Law, and holden for None.³⁹⁹

The shift in this provision from the reference to pretrial requisites as “due Process of Law” to the reference to trial procedure as “due Course of Law” is consistent with settled framing-era usage.⁴⁰⁰ Thus, it is apparent that the Hamiltonian faction understood that “due Process of Law” pertained to pretrial aspects of criminal procedure, including arrest.

3. Subsequent Controversies

The new state declaration of rights apparently did not settle the earlier controversy. Shortly after its enactment, the legislature passed an act on qualifications for office that barred former Tories from holding office. During the debate on that bill, Hamilton again reiterated his argument that the “law of the land” provision of the 1777 constitution prohibited legislative “disenfranchisement” of a class of persons. Adopting the posture of explaining “a sentence in the constitution, which seems not well understood by some gentlemen,” he again argued, citing Coke, that the “law of the land” guarantee required compliance with “due process of law” and thus precluded any legislative deprivation of any person’s right “under the constitution”:

In one article of [the 1777 New York Constitution], it is said no man shall be disenfranchised or deprived of any right he enjoys under the constitution, but by the *law of the land*, or the judgment of his peers. Some gentlemen hold that the law of the land will include an act of the legislature. But Lord Coke, that great luminary of the law, in his comment upon a similar clause, in Magna Charta, interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury. But if there were any doubt upon the constitution, the bill of rights enacted in this very session removes it. It is there declared that, no man shall

³⁹⁹ See *id.* (emphasis added).

⁴⁰⁰ See *supra* note 200 and accompanying text.

be disenfranchised or deprived of any right, but by *due process of law*, or the judgment of his peers. The words "*due process*" have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.⁴⁰¹

This passage clearly shows that Hamilton understood "due process of law" to be a "precise technical" term for pretrial aspects of criminal procedure rather than criminal trial procedure. That much is clear from Hamilton's discussion of the requisite of a "presentment and indictment" for a valid criminal prosecution, "*as contradistinguished from trial by jury.*" Likewise, this passage shows that Hamilton viewed "due process of law" as a label for matters falling within judicial rather than legislative authority—indeed, that "due process of law" can never be satisfied by a statute.

Overall, Hamilton's statement suggests that "due process of law" invoked common-law pretrial requisites. Forms of process such as "presentment and indictment" and "process of outlawry" were defined by common law and administered by judges. Moreover, because "due process of law" referred to judicial rather than legislative formulations, that term implied reference to common-law standards. Thus, although Hamilton did not actually say that the New York "due process of law" protection constitutionalized common-law pretrial standards or procedures, the logic of his treatment of "due process of law" would seem to imply as much. That implication seems especially plausible because it is apparent that the 1787 declaration was meant to curb legislative power; hence, it makes sense to infer that "due process of law" was meant to place existing common-law pretrial criminal standards beyond legislative authority, and that conclusion implies that "due process of law" was understood to constitutionalize common-law standards. Indeed, Hamilton's assertion that "due process of law" referred to judicial rather than legislative authority would seem to imply that the provision in the 1787 declaration that required that no per-

⁴⁰¹ Remarks of Alexander Hamilton in the New York Assembly Regarding an Act for Regulating Elections (Feb. 6, 1787), in 4 *THE PAPERS OF ALEXANDER HAMILTON* 34-35 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (emphasis added).

son be “taken” except according to “due process of law” meant that arrests had to comport with judicial standards—that is, with common-law arrest standards.

However, this conclusion rests on inferences rather than direct evidence. The specific controversy that had arisen in New York did not require Hamilton or anyone else to follow through to the ultimate destination of the logic of “due process of law.” Indeed, the specific controversy did not involve issues relating to arrests at all. Rather, in the context of the actual controversy, the gist of Hamilton’s claim was simply that punishments could be inflicted on individuals only by courts enforcing criminal law according to criminal procedure, not by legislative fiat. Moreover, we cannot be sure how widely Hamilton’s analysis was accepted. Thus, like the earlier state “law of the land” provisions, we can draw inferences that seem to indicate that “due process of law” connoted common-law standards, but we lack anything like conclusive statements to that effect.

IV. SEARCH-AND-SEIZURE PROVISIONS IN THE FEDERAL BILL

The Federal Bill of Rights differed from the state declarations of rights insofar as the federal legal system was a new entity, whereas the state legal systems were continuations of the earlier colonial legal systems—indeed, that seems to be why it was denoted a “bill” rather than a “declaration.” Notwithstanding that theoretical difference, however, the framing of the Federal Bill of Rights was largely a replay of the framing of the state declarations and drew upon the same understanding of common-law rights as the state declarations had.

A. The Demand for a Federal Bill of Rights

In October 1787, the Constitutional Convention proposed a new Federal Constitution that did not include a bill of rights as such, but did include several important criminal procedure protections among the limitations placed on the power of the Federal Congress. These included a provision that limited Con-

gress's power to suspend habeas corpus to times of genuine national emergency,⁴⁰² a ban against legislative bills of attainder or ex post facto definitions of crimes,⁴⁰³ a requirement that all criminal trials be by jury in the state in which the crime had been committed,⁴⁰⁴ and a set of provisions that dealt specifically with treason.⁴⁰⁵ The provisions dealing with habeas corpus, bills of attainder, and ex post facto legislation appear to reflect the delegates' continuing awareness of the Whig canon of earlier criminal procedure abuses in English constitutional history—including arrests and imprisonments without valid criminal charges.⁴⁰⁶ Indeed, the recognition of the importance of habeas corpus in the Constitution indicates that the Framers were well aware of the earlier history of arbitrary arrest and imprisonment.⁴⁰⁷

Notwithstanding the inclusion of these important protections, there was a last-minute proposal to include a more complete bill of rights. In particular, George Mason argued that without an expanded bill of rights, the people would not be protected in their *common-law* privileges.⁴⁰⁸ However, that pro-

⁴⁰² U.S. CONST. art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

⁴⁰³ *Id.* ("No Bill of Attainder or ex post facto Law shall be passed."). The Constitution also forbids state legislatures from passing bills of attainder or enacting ex post facto definitions of crime. See U.S. CONST. art. I, § 10.

⁴⁰⁴ U.S. CONST. art. III, § 2.

⁴⁰⁵ U.S. CONST. art. III, § 3.

⁴⁰⁶ The provision limiting suspension of habeas corpus would appear to rest upon an implicit expectation of a continuation of common-law arrest standards. As a practical effect, the limitation on Congress's power to suspend the availability of habeas corpus to test the legality of an arrest and imprisonment would have been meaningless if Congress were thought to possess the power to simply relax the standard for lawful arrests to authorize arrests on mere suspicion or discretion. See *supra* notes 283-86 and accompanying text (discussing George Mason's draft for the Virginia declaration). Hence, the adoption of the Habeas Corpus Suspension Clause suggests that the Federal Framers assumed that the habeas corpus remedy would enforce a fixed arrest standard—namely, the common-law standard. For example, Jefferson would have included "unremitting force of the habeas corpus laws" in a bill of rights, but did not mention general warrants or due process. See DUMBAULD, *supra* note 62, at 8. See also *supra* notes 351-53.

⁴⁰⁷ See *supra* note 214.

⁴⁰⁸ At the conclusion of the Constitutional Convention, Mason began his discussion of his objections to the proposed Constitution by stating:

[t]here is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declara-

posals failed. Thereafter, Antifederalists made the omission of a federal bill of rights a central issue in the ratification debates of 1787-1788.⁴⁰⁹

In particular, Antifederalists voiced alarm over the potential for Congress to interfere with the basic liberties that were then guaranteed in the state declarations.⁴¹⁰ With regard to criminal procedure, Antifederalists called for a wide variety of rights that again reflected two distinct sets of criminal procedure concerns. One set involved a general, diffuse concern with the possibility that the new Federal Congress might enact abusive criminal justice procedures.⁴¹¹ In response to that concern,

tion of Rights in the separate States are no security. Nor are the people secured even in the enjoyment of *the benefit of the common law* (which stands here upon no other foundation than its having been adopted by the respective acts forming the constitutions of the several states).

See 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 637 (2nd prtg. 1974) (emphasis added). For a discussion of the proposals for a bill of rights toward the end of the Constitutional Convention, see DUMBAULD, *supra* note 62, at 4-6.

⁴⁰⁹ Federalists responded to the call for a federal bill of rights by arguing that such a bill was unnecessary because, unlike the state governments, the Federal Congress would only possess limited powers specifically delegated to it rather than plenary power. Antifederalists then asked why, if that was the case, some protections of specific rights had been included, such as the provision assuring the availability of habeas corpus, and argued that the identification of these few rights in the Constitution might be construed to mean that no other rights existed. The Federalists rejoined that it would be impossible to list rights comprehensively. See, e.g., LASSON, *supra* note 45, at 87-91; DUMBAULD, *supra* note 62, at 6-10.

⁴¹⁰ Mott noted that during the ratification debates "[i]t was a favorite contention that the power of Congress over both the states and the individuals was too great" and that "[t]o prevent the majority trampling the rights of the minority under foot in an arbitrary manner, it was considered necessary to limit the legislative body by principles of liberty that were based on the common law and Magna Carta." MOTT, *supra* note 91, at 148-49; see also sources cited *supra* notes 20-22. Likewise, Mott concluded that during the state ratification conventions, "it is evident that, in the main, the fear of oppressive governmental action was confined to Congress." MOTT, *supra* note 91, at 151.

⁴¹¹ For example, during the Massachusetts ratification convention, Abraham Holmes raised numerous objections to the failure of the Constitution to set out criminal procedure protections including: the failure to provide for "trial in the vicinity where the fact was committed"; the omission of a requirement of an indictment by a grand jury, allowing prosecutions to be commenced by information "in consequence of which the most innocent person in the commonwealth may be taken by virtue of a warrant issued in consequence of such information, and dragged from his home, his friends, his acquaintances, and confined in prison, until the next session of the court"; the absence of provisions for the picking of an impartial jury; the absence of a provision for the right to counsel or to confrontation at trial; the absence of a prohibition of "cruel and unheard of punishments"; and the absence of a right against self-accusation or a presumption of

Antifederalists called for a bill of rights to generally assure common-law criminal procedure standards. Thus, Richard Henry Lee, a leading Antifederalist, summed up the contents of the rights that had not been secured in the Federal Constitution as “[a] reservation in favor of the Press, Rights of Conscience, Trial by Jury in Civil Cases, or *Common-Law securities*.”⁴¹²

In addition, Antifederalists also voiced an intense and specific fear that the new Congress would permit abusive searches of houses under general warrants to enforce the customs or excise collections that would be the principal sources of revenue for the new national government. This concern—fed by the broader concern about the potential for oppressive federal taxation—became a staple of the parade of horrors that Antifederalists presented in opposition to ratification of the new Constitution.⁴¹³ In this context, Antifederalists sometimes called for a ban against “hasty and unreasonable search warrants.”⁴¹⁴

innocence. See 2 ELLIOT'S DEBATES, *supra* note 263, at 109-11. Holmes concluded by noting that the 1780 Massachusetts Declaration of Rights:

took particular care to prevent the General Court from authorizing the judicial authority to issue a warrant against a man for a crime, unless his being guilty of the crime was supported by oath or affirmation, prior to the warrant being granted; why it should be esteemed so much more safe to intrust Congress with the power of enacting laws, which it was deemed unsafe to intrust our state legislature with, I am unable to conceive.

See 2 *id.* at 111-12.

⁴¹² Letter from Richard Henry Lee to Samuel Adams (October 27, 1787), in 2 THE LETTERS OF RICHARD HENRY LEE 456-57 (James Curtis Ballagh ed., Da Capo Press 1970) (1914) (emphasis added). See also *supra* notes 263-64 and accompanying text (quoting statements by George Mason and Edmund Randolph). Patrick Henry also called for a bill of rights to protect *common-law rights* during the Virginia ratification convention:

You have a bill of rights to defend you against the state government, which is bereaved of all power, and yet you have none against Congress, though in full and exclusive possession of all power! . . . What barriers have you to oppose to this most strong, energetic government? To that government you have nothing to oppose. All your defence is given up. This is a real, actual defect. It must strike the mind of every gentleman. When our government was first instituted in Virginia, we declared the common law of England to be in force.

See 3 ELLIOT'S DEBATES, *supra* note 263, at 445-46 (emphasis added).

⁴¹³ See Davies, *supra* note 2, at 609-11.

⁴¹⁴ Some proponents of Fourth Amendment “reasonableness” have seized on calls for a ban against “unreasonable searches and seizures” in Antifederalist pamphlets, as though those calls endorsed a free-standing reasonableness standard. However, those calls simply used that term as a shorthand for bans against too-loose warrants. See *id.*

Thus, as in the state declarations, Antifederalists tended to call for both a specific ban against general warrants and a broad “law of the land” protection that could also apply to arrests.⁴¹⁵

There was no significant opposition to ratification in the smaller states. However, there was substantial opposition to ratification in the larger states, and Antifederalists in those state ratification conventions put forward specific proposals for a federal bill of rights.

B. State Ratification Convention Proposed Amendments

Unsurprisingly, the Antifederalists in the larger states drew proposals for criminal procedure protections from the provisions that had previously been set out in the state declarations. As a result, the proposals for amendments that emerged from these ratification conventions typically included two search-and-seizure proposals: an invocative “law of the land” provision, and a more specific and detailed ban against general warrants.

The first contest over federal rights amendments occurred in the Pennsylvania convention in December 1787. The Antifederalist minority proposed rights amendments, but failed to gain the convention’s endorsement. Nevertheless, the minority

at 596-99 (discussing the interchangeability of calls for bans against “unreasonable searches and seizures” and “unreasonable search warrants” in the Antifederalist pamphlets “*Letters from the Federal Farmer*”).

⁴¹⁵ For example, in a discussion of the rights to be included in a federal bill of rights in one of the *Letters from The Federal Farmer*, a widely distributed Antifederalist publication, the Federal Farmer began by discussing a variety of common-law criminal trial rights, and then included a ban against too-loose warrants and a “law of the land” clause as follows:

. . . that all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure: and that no person shall be exiled or molested in his person or effects, otherwise than by the judgment of his peers, or according to the law of the land. A celebrated writer observes upon this last article, that in itself it may be said to comprehend the whole end of political society . . .

Federal Farmer, Letter No. XVI (Jan. 20, 1788), in 2 *THE COMPLETE ANTI-FEDERALIST* 328 (Herbert J. Storing ed., 1981). The term “molested in his person” would include arrest.

set out their proposed amendments in a minority report.⁴¹⁶ Among other criminal procedure provisions, the minority called for a paraphrase of Magna Carta 29 to the effect that no man was to be “deprived of his liberty, except by the law of the land or the judgment of his peers.” Notably, this provision focused on “liberty,” which emphasized arrest and imprisonment, and also used the traditional singular “law” rather than the plural “laws” that had been used in the 1776 Pennsylvania Declaration of Rights. That phrasing suggests that the Pennsylvania Antifederalists wanted to leave no doubt that they were asserting common-law standards—including common-law arrest standards.⁴¹⁷

The minority also called for a ban against unparticularized “warrants unsupported by evidence.” Unlike the warrant provision in the 1776 Pennsylvania declaration, the warrant provision the Antifederalists proposed did not include any preamble referring to a “right” regarding searches and seizures. Instead, it appears to have been based on the 1776 Virginia committee draft or the 1776 Maryland provision.⁴¹⁸ Apparently, the Pennsylvania minority did not think “unreasonable searches and seizures” added anything to the substance of the protection.

In February 1788, the Federalist and Antifederalist delegates to the Massachusetts ratification convention struck the initial compromise under which the state convention would ratify the Constitution with the understanding that amendments would promptly be made by the new Congress once the Constitution went into effect. However, the proposals agreed to were not for a bill of rights as such, but for the most part were proposals to alter or add to various clauses of the original Constitution;⁴¹⁹ the only criminal procedure proposal was a requirement of a grand jury indictment as a requisite for felony prosecutions, but with an exemption for military justice.⁴²⁰ In June 1788, the

⁴¹⁶ See DUMBAULD, *supra* note 62, at 173-75.

⁴¹⁷ See *id.* at 173 (number 3).

⁴¹⁸ See *id.* (number 5).

⁴¹⁹ See *id.* at 175-77 (setting out nine proposed amendments).

⁴²⁰ See *id.* at 175-76 (Article “Sixthly”). The exemption for military justice had previously been included in the 1780 Massachusetts criminal procedure provision. See *supra* text accompanying note 357.

New Hampshire ratification convention adopted essentially the same proposed amendments as those endorsed by the Massachusetts convention.⁴²¹

In April 1788, the Maryland ratification convention also proposed amendments; those relating to criminal justice involved standards for jury trials, a protection against double-jeopardy, an exemption for military justice, and a ban against general warrants.⁴²² Because this last proposal was based upon the warrant provision in the 1776 Maryland declaration, it also did not include any preamble reference to “unreasonable

There also was a last minute, unsuccessful attempt to add a brief bill of rights to the proposed amendments. The first of the proposed amendments adopted by the convention was a forerunner of the Federal Tenth Amendment: “*First*, That it be explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised.” *Id.* at 175. Toward the end of the Massachusetts ratification convention, Samuel Adams introduced a proposal to expand this provision to include a brief listing of several specific rights. Adams proposed adding the following to this proposed amendment:

And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the Press, or the rights of Conscience; or to prevent the people of the United States who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning in a peaceable and orderly manner, the Federal Legislature, for redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers, or possessions.

Amendments proposed to the Massachusetts ratifying convention by Samuel Adams, in JOHN K. ALEXANDER, *SAMUEL ADAMS: AMERICA’S REVOLUTIONARY POLITICIAN* 207 (2002). The inclusion of a ban against general warrants in the form of “unreasonable searches and seizures” in his proposal, but the absence of any other criminal procedure provision, probably reflects the intense opposition to general warrant revenue searches among Massachusetts Antifederalists. See Davies, *supra* note 2, at 721-22.

Adams introduced his proposed amendments on February 6, 1788. See 2 ELLIOT’S *DEBATES*, *supra* note 263, at 162 (noting that “The Hon. Mr. ADAMS introduced some amendments” but withdrew them after discussion; but not setting out either the proposed “amendments” or the discussion). One source reports that Adams withdrew his proposal after it caused consternation in the convention (probably because it threatened to undo the convention’s progress and the larger compromise) but that other Antifederalists renewed the proposal and forced a vote in which it failed. See JOHN C. MILLER, *SAM ADAMS: PIONEER IN PROPAGANDA* 383 (1936).

⁴²¹ See DUMBAULD, *supra* note 62, at 181-82.

⁴²² See *id.* at 177-80 (including trial by jury in criminal cases, “[no] second trial after acquittal”, and an exemption for “cases as may arise in the government of the land or naval forces” (article 2), and a ban against general warrants (article 8)).

searches and seizures."⁴²³ The Maryland proposals did not include any "law of the land" provision.

In June 1788, the Virginia ratification convention endorsed a more extensive set of proposed amendments.⁴²⁴ The proposals that involved criminal procedure included trial rights and self-accusation;⁴²⁵ a paraphrase of Magna Carta 29 "[t]hat no free-man ought to be taken, imprisoned . . . but by the law of the land";⁴²⁶ a provision that effectively guaranteed the availability of the remedy of habeas corpus (which came immediately after the "law of the land" provision);⁴²⁷ a provision that banned excessive bail or punishment;⁴²⁸ and, finally, a detailed warrant standards provision. This last provision included a preamble statement of a right against "unreasonable searches and seizures" that "therefore" commanded that unparticularized general warrants, or warrants lacking "legal and sufficient cause . . . ought not be granted."⁴²⁹ Notably, during the Virginia conven-

⁴²³ See *id.* at 178 (art. 8).

⁴²⁴ See *id.* at 182-89. This proposal called for twenty amendments relating to rights, and another twenty that were modifications or additions to the body of the original Constitution.

⁴²⁵ See *id.* at 183-84 (art. 8).

⁴²⁶ See *id.* at 184:

Ninth. That no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties, privileges or franchises, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the law of the land.

This expanded phrasing referred to arrest ("taken, imprisoned") even more explicitly than had the "deprived of liberty" formulation in the 1776 Virginia declaration. See *supra* text accompanying note 289. See also DUMBAULD, *supra* note 62, at 22, n.40 (noting that this ninth article in the Virginia convention proposals was "an expansion of the last clause of Article 8 of the Virginia Bill of Rights" and stating that the Virginia convention endorsed "a due process clause, reminiscent of Magna Charta, and now familiar in the form embodied in the Fifth and Fourteenth Amendments to the United States Constitution").

⁴²⁷ See *id.* at 184 (art. 10).

⁴²⁸ See *id.* (art. 13).

⁴²⁹ See *id.* at 184:

Fourteenth, That every freeman has a right to be secure from all unreasonable searches and siezures of his person, his papers and his property; all warrants, therefore, to search suspected places, or sieze any freeman, his papers or property, without information upon Oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general Warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted.

tion, Edmund Randolph argued that Magna Carta 29 addressed only criminal procedure, but not procedure in civil trials.⁴³⁰ In August, 1788, the North Carolina ratification convention also proposed essentially the same set of criminal procedure amendments as Virginia had.⁴³¹

The New York convention also endorsed extensive proposed amendments in July, 1788.⁴³² The New York criminal procedure amendments were generally similar to those proposed by Virginia (probably because both sets were drawn from common Antifederalist sources), except that New York added a more extensive set of protections regarding venue and other aspects of criminal trials than had previously been proposed.⁴³³ Among the proposed amendments dealing with criminal justice, New York proposed a paraphrase of Magna Carta 29 that, consistent

⁴³⁰ See HOWARD, *supra* note 103, at 228 (quoting 3 ELLIOT'S DEBATES, *supra* note 263, at 573).

⁴³¹ See DUMBAULD, *supra* note 62, at 198, 200-01 (articles 8, 9, 10, 13, and 14).

⁴³² See *id.* at 189-98 (proposed amendments not numbered).

⁴³³ The New York ratification convention proposed the following amendment regarding criminal jury trials:

That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States, and such *Trial should be speedy, public*, and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such Jury. But in cases of Crimes not committed within any County of any of the United States, and in Cases of Crimes committed within any County in which a general Insurrection may prevail, or which may be in the possession of a foreign Enemy, the enquiry and trial may be in such County as the Congress shall by Law direct; which County in the two Cases last mentioned should be as near as conveniently may be to that County in which the Crime may have been committed. And that *in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusation, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defense*, and should not be compelled to give Evidence against himself.

That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.

See DUMBAULD, *supra* note 62, at 190-91 (emphasis added). The italicized language became Madison's proposed Sixth Amendment. See *infra* note 457 and accompanying text.

with its 1787 Declaration of Rights,⁴³⁴ used "due process of law" rather than "the law of the land":

That no Person ought to be taken imprisoned or disseised of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law.⁴³⁵

New York also endorsed essentially the same detailed ban against too-loose or general warrants, including the prefatory reference to "unreasonable searches and seizures" as Virginia had.⁴³⁶ Notably, although New York set out the criminal procedure provisions in a procedural sequence running from pretrial to trial protections, it placed the ban against general warrants at the end of those provisions, rather than integrating it into the procedural sequence.⁴³⁷

Thus, the treatment of search and seizure in the state ratification convention proposals typically mirrored the two provisions included in the earlier state declarations: (1) a provision commanding, among other things, that no person be "taken" except according to "the law of the land" or "due process of law"; and (2) another more detailed provision setting out minimum standards for valid warrants.

C. Madison's Proposals for a Bill of Rights

After the Constitution was ratified and the First Congress began meeting in New York City in the spring of 1789, James Madison, a member of the House of Representatives, took on the task of drafting proposed amendments. He had considerable

⁴³⁴ See *supra* notes 396-99 and accompanying text.

⁴³⁵ See DUMBAULD, *supra* note 62, at 190.

⁴³⁶ See *id.* at 191:

That every Freeman has a right to be secure from all unreasonable searches and seizures of his person his papers or his property, and therefore, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.

See *id.*

⁴³⁷ See *id.* at 190-91. For the ordering of the New York criminal procedure proposals, see *infra* note 456.

background for the task, having been a member of the committee that had framed the 1776 Virginia Declaration of Rights,⁴³⁸ a member of the committee that had drafted the brief bill of rights in the 1787 Northwest Ordinance,⁴³⁹ a delegate to the Constitutional Convention, and a delegate to the Virginia ratification convention.⁴⁴⁰ Although Madison had earlier expressed doubts as to the practical value of a bill of rights,⁴⁴¹ he had endorsed such a bill during his campaign for Congress.⁴⁴²

Whatever Madison's sense of the ultimate value of a bill of rights, it appears that he took the drafting seriously. He plainly drew upon state ratification convention proposals as well as earlier state declarations of rights as a starting point, but he also made several adjustments and innovations in phrasing that had not appeared in the prior proposals or provisions.⁴⁴³ Because he thought that enactment of a bill of rights was important for political stability, he sought to include "those essential rights, which have been thought in danger,"⁴⁴⁴ but also undertook to avoid unnecessary controversy that might impair passage.

Madison presented his proposals for amendments to the House in a speech on June 8, 1789.⁴⁴⁵ In that speech, he identified most of the amendments he proposed as comprising a "bill of rights," but also proposed several additional amendments

⁴³⁸ See *supra* note 287.

⁴³⁹ See *infra* note 475.

⁴⁴⁰ See 3 ELLIOT'S DEBATES, *supra* note 263, at 616-20, 626-27.

⁴⁴¹ See, e.g., DUMBAULD, *supra* note 62, at 7-8.

⁴⁴² See, e.g., *id.* at 23 n.42, 33.

⁴⁴³ Madison innovated in phrasing the Fifth Amendment protection against self-accusation as a protection against being a "witness against himself." See Davies, *Fifth Amendment*, *supra* note 19, at 1008-09. He also shifted from "law of the land" to "due process of law," discussed *infra* text accompanying note 466. He also innovated in phrasing the ban against general warrants, discussed *infra* notes 502-04 and accompanying text.

⁴⁴⁴ Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), in 11 THE PAPERS OF JAMES MADISON, *supra* note 287, at 415-16 (Robert A. Rutland, et al. eds., 1977) (endorsing a bill of rights that would include "the clearest, and strongest provision . . . for all those essential rights, which have been thought in danger, such as the rights of conscience, the freedom of the press, trials by jury, exemption from general warrants, &c."). For discussion of Madison's goal of avoiding controversial amendments, see DUMBAULD, *supra* note 62, at 28, 34.

⁴⁴⁵ James Madison, Speech to the House of Representatives (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 287, at 197-210 (Charles F. Hobson, et al. eds., 1979) [hereinafter Madison's Speech].

which did not involve rights.⁴⁴⁶ Like the state ratification convention proposals and the earlier state declarations, Madison included among his proposals for a "bill of rights" a "due process of law" provision and another, more detailed provision directed at banning general warrants. Moreover, his proposals made it clear that both of these provisions were aimed at limiting congressional power.

1. Aimed at Congress

The most underappreciated fact about the Federal Bill of Rights is that it did not start out to be a supplemental document at the end of the Constitution. Madison conceived the bill as a limit on legislative power,⁴⁴⁷ and he expressed special concern

⁴⁴⁶ Commentators have sometimes ignored the distinction Madison drew among his proposed amendments. For example, Professor Amar has advanced a "structural" interpretation of the Bill of Rights in which he describes provisions of the Bill as having been aimed at empowering "democratic" structures rather than protecting individuals from government. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998). However, Amar based that claim largely on two proposed amendments, neither of which was ratified, and neither of which Madison nor anyone else included in discussions of a "bill of rights." One of the amendments had to do with the allocation of seats in House of Representatives, and the other had to do with the pay of legislators. *Id.* at 8-9, 18.

The most notable feature of Amar's historical claim is that he offered no evidence that anyone treated either of the two failed amendments as part of the Bill of Rights. The evidence is to the contrary. Madison clearly distinguished the two failed proposed amendments from his proposals for a "bill of rights." He used that label when describing the amendments that now constitute the first nine amendments, which he addressed first because he characterized them as being of the first importance. See Madison's Speech, *supra* note 445, at 203-07. After that discussion, Madison presented the two failed amendments as other proposals that Congress should consider. *Id.* at 207-08 (introducing the proposal regarding allocation of House seats with "in the next place," and the proposal regarding legislative pay as one of "several lesser cases"). Likewise, Madison described the Tenth Amendment as only a "superfluous" and "unnecessary," but harmless provision that was redundant to the express description of the powers of Congress already stated in Article I of the Constitution. *Id.* at 209.

⁴⁴⁷ Madison's understanding of a bill of rights as a limit on legislative power is also evident in his earlier suggestions for a Kentucky constitution. He wrote:

If it were possible it would be well to define the extent of the Legislative power but the nature of it seems in many respects to be indefinite. It is very practicable however to enumerate the essential exceptions. The Constitution may expressly restrain them from meddling with religion—from abolishing Juries, from taking away the Habeas corpus—from forcing a citizen to give evidence against himself, from controuling the press, from enacting retrospective laws at least in criminal cases, from abridging the right of suffrage, from seizing

regarding the need to curb congressional power when he introduced his proposals for amendments in the House on June 8, 1789.⁴⁴⁸ To make good on that concern, he proposed *inserting* most of the rights amendments, including the proto-Fifth and proto-Fourth Amendments, *into the limits on the power of Congress previously set out in Article 1, Section 9, of the Constitution*.⁴⁴⁹ Additionally, Madison proposed revising and expanding the Criminal Jury Trial Clause in Article III, Section 2, to explicitly state several rights that pertained to such matters as criminal venue, the requirement of unanimous jury verdicts, the requirement of a grand jury indictment for felony prosecutions, and a provision exempting military justice from such protections.⁴⁵⁰

The eleven-member Vining committee which initially reviewed Madison's proposal generally accepted his plan to insert amendments into the limitations on the power of Congress in Article I and to also revise Article III, but the committee made one change by moving his proto-Sixth Amendment dealing with criminal trial and evidence rights to the proposed revision of the Criminal Jury Trial Clause in Article III instead of inserting it into Article I.⁴⁵¹

When the committee reported, there was a motion to convert the amendments to a supplementary format, but it was voted down. The full House then began to debate the contents of the proposed rights amendments under the format Madison and the committee had proposed. Thus, the House considered the proposed amendments with the understanding that they were limitations on Congress. However, after the House had

private property for public use without paying its full Valu, from licensing the importation of Slaves, from infringing the Confederation &c. &c.

Letter to Caleb Wallace, (Aug. 23, 1785), in 8 THE PAPERS OF JAMES MADISON, *supra* note 287, at 350-51 (Robert A. Rutland, et al. eds, 1973).

⁴⁴⁸ See Davies, *supra* note 2, at 700 nn.437-38.

⁴⁴⁹ See Madison's Speech, *supra* note 445, at 201-02 (proposing amendments to be inserted "in article 1st, section 9, between clauses 3 and 4").

⁴⁵⁰ Madison's proposed revision and expansion of the Criminal Jury Trial Clause is set out *infra* note 457.

⁴⁵¹ See Amendments Reported by the Select Committee (July 28, 1789), in DUMBAULD, *supra* note 62, at 210-12 (showing that the proposals for a "due process of law" guarantee and for warrant standards were to be inserted in "Art. I, Sec. 9").

debated the proto-Fifth and proto-Fourth Amendments, the House decided to scrap Madison's idea of altering the text of the Constitution itself and instead decided to set out the rights amendments in a "supplementary" format.⁴⁵²

The apparent reason for the change to the supplementary format was that some members of the House were strongly opposed to altering the language of the original Constitution.⁴⁵³ Significantly, however, there is no indication in the record of the debate of any change in the understanding that the rights amendments were aimed at limiting congressional power. Thus, although the point is frequently overlooked by commentators and Justices, there is no doubt that both the Fifth Amendment's "due process of law" clause and the Fourth Amendment's ban against too-loose warrants were aimed at *limiting the powers of Congress*.⁴⁵⁴

2. Madison's Criminal Procedure Proposals

Madison proposed inserting four provisions that involved criminal procedure into the limitations on congressional power in Article I. His four proposed provisions eventually became the Fourth, Fifth, Sixth, and Eighth Amendments—but that is not the order in which he proposed them. The four criminal justice provisions that Madison proposed (for simplicity, I refer to his

⁴⁵² See Davies, *supra* note 2, at 715-16, n.475.

⁴⁵³ See Davies, *Arrest*, *supra* note 3, at 408 n.570.

⁴⁵⁴ This basic fact is often completely overlooked in commentaries. For example, Lasson never mentioned it in his book on the Fourth Amendment. See LASSON, *supra* note 45. Likewise, Mott, in his book on due process, concluded that, beyond the due process of law clause in the Fifth Amendment, only the First, Second, Ninth, and Tenth Amendments "could possibly be construed to limit Congress." MOTT, *supra* note 91, at 160. Thus, he apparently construed the Third, Fourth, Fifth (except for the due process clause), Sixth, Seventh, and Eighth Amendments as not being aimed at Congress. Notably, however, he never mentioned Madison's proposal to insert the first eight Amendments in the limitations on Congress, or the Vining committee's endorsement of that proposal; hence, it appears he overlooked those facts.

Discussions of the Bill of Rights in Supreme Court opinions also typically omit the basic fact that the Bill of Rights was meant to limit the power of Congress. See, e.g., Justice Souter's seeming endorsement of legislative "sovereign[ty]" regarding arrest standards in his opinion for the Court in *Atwater v. City of Lago Vista*, 532 U.S. 335 (2001), discussed in Davies, *Arrest*, *supra* note 3, at 401-02.

proposals as the “proto-Fifth Amendment,” etc.)—in the order he proposed them—were as follows:

[The proto-Fifth Amendment:] No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

[The proto-Eighth Amendment:] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[The proto-Fourth Amendment:] The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

[The proto-Sixth Amendment:] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.⁴⁵⁵

Note that, in contrast to the inverted procedural ordering (starting with trial rights) that had been used in most of the prior state declarations and proposals, Madison followed the New York proposals in setting out the criminal procedure provisions in a forward-looking sequence that tracked the stages of a criminal prosecution (starting with arrest and pretrial aspects).⁴⁵⁶ Likewise, Madison also drew on the New York pro-

⁴⁵⁵ See DUMBAULD, *supra* note 62, at 206, 207-08.

⁴⁵⁶ One peculiar feature of the clusters of criminal procedure clauses that had been included in the earlier Virginia, Pennsylvania, and Massachusetts state declarations was that they addressed the rights associated with the various stages in a criminal prosecution in an inverted order—they started with jury trial and unanimous verdict, then addressed self-incrimination, and then concluded with arrest and indictment in the

posals for criminal trial rights, putting some of those protections in the proto-Sixth Amendment as limitations on congressional power, and fashioning the rest into his proposal to revise and enlarge the Criminal Jury Trial Clause in Article III of the Constitution.⁴⁵⁷

"law of the land" provisions. *See supra* text accompanying notes 289, 356. The proposals adopted by the Virginia ratifying convention in 1788 still used that inverted procedural ordering. *See supra* text accompanying notes 425-29.

However, the slightly later 1788 New York ratification convention innovated by rearranging the criminal procedure proposals in a forward-looking procedural sequence starting with "due process of law" (and arrest), as had the 1787 New York Declaration of Rights. Specifically, New York's ratification convention proposals (which were not numbered) set out criminal procedure protections in the following order: the guarantee of "due process of law" (regulating arrest); the prohibition against double jeopardy (that is, protection against initiation of a redundant prosecution); habeas corpus (the remedy for invalid arrest or prosecution); bail (also pertinent to arrest and pretrial imprisonment); court proceedings, including grand jury indictment, venue, and the right to a speedy and public jury trial; rights pertaining to evidence and counsel at trial; and, finally, a ban against general warrants. *See DUMBAULD, supra* note 62, at 190-91. However, the New York proposals also did not attempt to integrate the ban against general warrants into the criminal procedure sequence, but simply attached that provision at the end of the criminal procedure provisions.

⁴⁵⁷ Madison obviously drew heavily on the New York proposal for trial rights, quoted *supra* note 433, but he subdivided those rights into two sets. He revised the italicized parts of the New York proposal, quoted *supra* note 433, into the proto-Sixth Amendment (which he placed among the limits on the powers of Congress). *See supra* text accompanying note 455. He moved the right against compelled self-accusation to the proto-Fifth Amendment. He then revised the remainder of the New York provisions into his proposed revision of the Criminal Jury Trial Clause in the third clause of Article III, Section 2, of the Constitution as follows:

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

See DUMBAULD, supra note 62, at 208-09.

The final paragraph of Madison's revision of the Criminal Jury Trial Clause in Article III had a more direct relation to criminal procedure than may now be apparent. Because unlawful actions by an officer, such as an unlawful arrest, were understood to constitute personal trespasses rather than governmental acts, this final paragraph

For present purposes, the most important feature of this ordering is that Madison put the “due process of law” protection among the rights that related to the *initiation* of criminal prosecution in the proto-Fifth Amendment. By doing so, he clearly distinguished the “due process of law” protection from both criminal trial rights in the proto-Sixth Amendment and the ban against general warrants in the proto-Fourth Amendment.

*D. The Framing of the “Due Process of Law”
Clause in the Fifth Amendment*

As finally adopted by Congress, the Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Modern commentators have expressed puzzlement over this collection of five clauses. For example, Professor Leonard Levy dismissed the Fifth Amendment as a “miscellaneous” collection of clauses.⁴⁵⁸ That label may seem justified if one assesses the *modern* content assigned to those clauses. The clauses that pertain to grand jury indictment, double jeopardy and self-incrimination clearly pertain to various stages in criminal prosecutions. In contrast, the Due Process Clause now carries

ensured that trespass suits for damages brought against abusive officers would be decided by a jury rather than by a judge. This final paragraph evolved into the Seventh Amendment during the House deliberations. *See id.* at 212 (Select Committee of Eleven revision of language to “In suits at common law the right of trial by jury shall be preserved”); *id.* at 215 (proto-Seventh Amendment set out as a separate amendment in the proposed amendments sent to the Senate).

⁴⁵⁸ *See* LEVY, *supra* note 102, at 180 (“As originally proposed by James Madison, . . . the Fifth Amendment’s self-incrimination clause was part of a miscellaneous article . . .”).

broad and diffused meanings that seem to relate at least as much to civil as criminal matters, and the final Takings Clause seems entirely civil rather than criminal in character.

However, the organizing theme of Madison's proto-Fifth Amendment is plain enough if one pays attention to the ordering of his proposals and to the meanings the clauses carried in 1789. The criminal procedure protections, including "due process of law," related to the *initiation* of a criminal prosecution, and the final Takings Clause prohibited a form of forfeiture that might otherwise have evaded the requisites for a criminal prosecution.⁴⁵⁹

1. Madison's Proto-Fifth Amendment

Madison's proposal for the proto-Fifth Amendment did not include the Grand Jury Indictment Clause that appears at the beginning of the Fifth Amendment itself—that clause was inserted later by the Senate.⁴⁶⁰ Rather, Madison's proto-Fifth Amendment consisted of four protections: the ban against double jeopardy; the ban against compelled self-incrimination; the "due process of law" protection; and the takings provision:

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.⁴⁶¹

The first two clauses in Madison's proto-Fifth Amendment clearly applied to criminal matters. Moreover, as understood in 1789, they applied to the earliest stages in a prosecution. The protection against double-jeopardy may initially seem like a topic that might come at the end of a listing of criminal procedure rights insofar as it arises because of a previous acquittal or conviction. However, the operative importance of that ban lies

⁴⁵⁹ The relationship of the Takings Clause is discussed *infra* text accompanying notes 479-82.

⁴⁶⁰ See *infra* note 488.

⁴⁶¹ See *supra* text accompanying note 455.

in prohibiting the later *reinitiation* of a redundant prosecution. Thus, the protection afforded really pertains to the outset of a prosecution.

Similarly, what we now call the right against compelled self-incrimination was still important primarily before trial in 1789. The term “self-incrimination” is modern: “incrimination” does not appear in framing-era works, but the verb “criminate” does; it meant “accuse.” Thus, the more apt historical shorthand is to speak of the right against compelled self-*accusation*.⁴⁶² The salient meaning of the right during the framing-era was that, as Blackstone put it, the evidence that formed the basis for a criminal charge was to be obtained from sources other than the interrogation of a suspected person.⁴⁶³ Moreover, the modern conception of a “right to be silent” at trial had not yet emerged.⁴⁶⁴ Thus, there was a sound basis for Madison’s

⁴⁶² See Davies, *Fifth Amendment*, *supra* note 19, at 1002.

⁴⁶³ 1 BLACKSTONE (1st ed. 1765), *supra* note 135, at 68; 4 *id.* (1st ed. 1769) at 293; *United States v. Burr*, 25 F. Cas. 38, 39-40 (C.C.D. Va. 1807) (No. 14,692e) (Marshall, C.J., presiding) (“every witness is privileged not to accuse himself” and “[i]t is a settled maxim that no man is bound to criminate himself”).

As of 1789, official pretrial interrogation was limited to the post-arrest “examination” of an arrestee, conducted by a judicial officer, usually a justice of the peace, under the Marian statutes. However, common law forbade the taking of an arrestee’s examination under oath (a form of legal compulsion). Significantly, authority for this examination arose only *after* a named complainant had charged the arrestee with the actual commission of a crime. Thus, the examination did not constitute the sort of investigation now associated with police interrogations. Peace officers such as constables had no authority to interrogate either before or after an arrest in 1789. See Davies, *Fifth Amendment*, *supra* note 19, at 1001-07.

⁴⁶⁴ In contrast to modern doctrine, as of 1789 there was no conception that a defendant had a “right to be silent” at trial. To the contrary, the arrestee’s statements or silence during his post-arrest Marian examination were admissible as evidence at his trial. Moreover, although a defendant was not compelled to speak at trial, his silence would be considered against him. Indeed, trial before the petit jury (which came after a grand jury had already concluded that there was *prima facie* proof of guilt) constituted the defendant’s opportunity to rebut the evidence against him. *Id.* at 999-1000.

The modern understanding that the Fifth Amendment creates a “right to be silent” at trial appears to have emerged only well after the framing, as the increasing presence of defense counsel altered the criminal trial. *Id.* at 1041-43. Thus, Madison’s phrasing of the right against self-accusation as a right not to be compelled “to be a witness against himself” does not mean that the right was intended to be only a “trial right,” as Justice Thomas’s opinion for the Court erroneously claimed in *Chavez v. Martinez*, 538 U.S. 760, 767 (2003). Rather, Madison’s stylistic innovation simply recognized that if a defendant’s pretrial statements were admitted at trial, what he had said previously had the same practical effect as if he had made the statements as a “witness”

decision to place the right against compelled self-accusation in the proto-Fifth Amendment rather than among the trial rights in the proto-Sixth Amendment; the right against compelled self-accusation was primarily a pretrial right.⁴⁶⁵

Madison's "due process of law" clause obviously drew on the earlier provisions and proposals that paraphrased Magna Carta 29. As noted above, those earlier provisions pertained to such pretrial matters as arrests and indictments. Madison's inclusion of this clause in his initial criminal procedure provision indicates that he also understood that "due process of law" involved *pretrial* criminal protections.

2. Madison's Choice of "Due Process of Law"

Of course, Madison obviously followed Hamilton's and the New York ratification convention's proposals in substituting "due process of law" for the more traditional "law of the land" formulation.⁴⁶⁶ He had an obvious motive for making that substitution: the phrase "the law of the land" had already been used—in the broader sense in which it connoted national law—in the Supremacy Clause in Article VI of the Constitution.⁴⁶⁷ Hence, although in 1789 "the law of the land" could carry two distinct meanings depending on the context in which it was

testifying against himself during his trial. See Davies, *Fifth Amendment*, *supra* note 19, at 1008-09.

⁴⁶⁵ This was a deliberate choice by Madison insofar as he did not include that right among the trial right provisions he fashioned from the New York ratification convention proposals. See *supra* note 457.

The Vining committee that reviewed Madison's proposals apparently shared his understanding of the pretrial importance of the right against compelled self-accusation. As noted above, that committee moved Madison's proto-Sixth Amendment from the limits on congressional power to be inserted into Article I to the proposed revision and expansion of the Criminal Jury Trial Clause in Article III, thus consolidating all of the proposals that pertained to criminal trials in the latter. See *supra* note 451 and accompanying text. However, the Vining committee did not move the right against compelled self-accusation to the trial rights; rather, it left the right against compelled self-accusation among the pretrial rights in the Fifth Amendment. See DUMBAULD, *supra* note 62, at 210-12.

⁴⁶⁶ See *supra* notes 394-401 and accompanying text; see also text accompanying note 435. Mott was apparently unfamiliar with the 1787 New York statutory Declaration of Rights and the New York ratification convention's proposals because he treated Madison's use of "due process of law" as though it were "an innovation in America." MOTT, *supra* note 91, at 17.

⁴⁶⁷ U.S. CONST. art. VI ("supreme Law of the Land").

used, it nevertheless would have been awkward to use that phrase in a different sense in the Fifth Amendment than in the Supremacy Clause. Using “due process of law” in the proto-Fifth Amendment solved that problem.

Additionally, it seems likely that Madison would have been familiar with the reason why the substitution of terms had been made in New York, and that he would have been sympathetic to the concerns that prompted the change. Madison not only was in New York City when he made his proposals, but he had recently been collaborating with Hamilton on the *Federalist Papers*. Hence, it seems likely that he was familiar with the New York controversy that led to the 1787 New York Declaration of Rights. Moreover, his concern with the potential for oppression by a legislative majority paralleled the concerns that Hamilton had addressed in New York.⁴⁶⁸ Thus, it is quite plausible that Madison shared Hamilton’s understanding that the Cokean term “due process of law” provided a stronger and less ambiguous protection than the traditional “law of the land” formulation.⁴⁶⁹

Madison also followed Hamilton’s and the New York ratification convention’s proposals when he simply invoked “due process of law” while omitting the by-then archaic and confusing alternative reference to “the judgment of his peers” that appeared in traditional paraphrases of Magna Carta 29. Probably because “judgment of his peers” was included in Magna Carta 29, most of the earlier state declarations had included the phrase when they paraphrased that historical text. However, by the framing era, the phrase “judgment of his peers” had been corrupted into a label for jury trial,⁴⁷⁰ so the rote inclusion of

⁴⁶⁸ See Davies, *supra* note 2, at 700 n.438.

⁴⁶⁹ See *supra* text accompanying notes 394, 401. See also Davies, *Arrest*, *supra* note 3, at 414-15.

⁴⁷⁰ As noted above, Coke had construed “judgment of his peers” to refer only to the right of nobles of the realm (literal “peers”) to be tried in the court of the king’s steward rather than in the common-law courts. Thus, the disjunctive reference to judgment of his peers “or” the law of the land was not merely a drafting quirk; rather, it reflected an intentional distinction between what amounted to two different criminal procedures: “judgment of his peers” referred to criminal procedure for nobles, while “law of the land” referred to criminal procedure for commoners. By the eighteenth century, however, the notion of a separate criminal justice system for nobles had become archaic; hence, writers of that period (who seem to have been loathe to delete historical verbiage) corrupted

that phrase in some of the state "law of the land" provisions tended to obscure the pretrial content of that protection. However, Madison avoided that association by deleting the phrase. Thus, it is evident that he understood the "due process of law" guarantee to refer at least primarily to the pretrial requisites for criminal prosecutions rather than to trial rights.

3. The Brevity of Madison's "Due Process of Law" Clause

Madison's "due process of law" clause was also shorter than almost all of the earlier paraphrases of Magna Carta 29. His paraphrase was simply that "no person shall . . . be deprived of life, liberty, or property, without due process of law." The brevity of that rendition is evident if one compares it to the more complete paraphrase of Magna Carta 29 which had been included in the "due process of law" provision proposed by the New York ratification convention. Madison's draft used only the portion of that fuller rendition that is italicized below:

That *no Person ought to be taken imprisoned or disseised of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of law.*

This rendition omitted the usual references to a person's being "arrested," "taken," or "imprisoned." Likewise, it did not focus solely on deprivation of "liberty" (as the 1776 Virginia "law

"judgment of his peers" into a label for trial by a jury of one's equals or neighbors. However, the continued use of that term in paraphrases of Magna Carta 29 introduced considerable confusion or redundancy in declarations of rights that included other explicit confirmations of the right to a criminal jury trial.

Probably for that reason, several of the earlier state provisions and proposals had dropped the archaic reference to "the judgment of his peers." The 1777 North Carolina declaration had omitted "judgment of his peers" and simply used "the law of the land" when it paraphrased Magna Carta 29. See *supra* text accompanying note 320. Likewise the provision in the 1787 New York declaration that dealt with arrest (referring to a person being "taken or imprisoned") omitted "judgment of his peers" and used only "due process of law" (although it also used "due Course of Law" in a later provision that dealt with the criminal trial itself). See *supra* text accompanying notes 397, 399. Similarly, the proposals endorsed by the 1788 Virginia and New York ratification conventions had also deleted "judgment of his peers" and simply referred to "the law of the land" or "due process of law." See *supra* text accompanying notes 426, 435.

of the land” provision had⁴⁷¹). Rather, the brevity and breadth of this paraphrase gave it a very abstract appearance.⁴⁷²

Why did Madison adopt that phrasing? The most likely answer is suggested by the 1787 Northwest Ordinance.⁴⁷³ The Ordinance included a short bill of rights that included a provision that “no person shall be deprived of life, liberty, or property, but by the judgment of his peers or the law of the land.”⁴⁷⁴ Madison was surely aware of that language because he was on the committee that developed the Ordinance (though he was not the principal drafter).⁴⁷⁵ Hence, it appears likely that he simply borrowed that approach, albeit substituting “due process of law” for the Ordinance’s “law of the land.”

⁴⁷¹ See *supra* text accompanying notes 289-91.

⁴⁷² In that context, it may be significant that the Antifederalist “Federal Farmer” had written in a pamphlet that the law of the land protection in Magna Carta 29 “may be said to comprehend the whole end of political society.” Letters from The Federal Farmer XVI, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 415, at 328.

⁴⁷³ The Ordinance was adopted in the summer of 1787, virtually on the eve of the Constitutional Convention, by the Continental Congress, which was still sitting under the Articles of Confederation, and provided for the self-government of that federal territory prior to admission to statehood. See SOURCES, *supra* note 104, at 387-98 (discussing the historical background and setting out the Ordinance).

⁴⁷⁴ The bill of rights included in the Ordinance read:

Article II. The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishment shall be inflicted. *No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land*, and should the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

See SOURCES, *supra* note 104, at 392, 395 (emphasis altered). Curiously, this provision did not refer to deprivation of “life.”

⁴⁷⁵ ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1776-1791, at 101-03 (1955, reprinted 1991) (indicating that the draft of the Ordinance was in the handwriting of Nathan Dane, but the committee also consisted of Thomas Jefferson, James Madison, James Monroe, and Rufus King). Madison also participated in a discussion of the bill of rights in the Ordinance during the Constitutional Convention. See SOURCES, *supra* note 104, at 390.

There is no indication that the language of the Ordinance was intended to eliminate the traditional arrest protections of "the law of the land." To the contrary, because this paraphrase addressed deprivation of "liberty or property," it still reached the full scope of the traditional guarantee, and the reference to "liberty" was sufficient to include arrest. (The Ordinance had not included any ban against general warrants, so its "law of the land" clause was the only provision in its bill of rights that could address search and seizure at all.)⁴⁷⁶

Nevertheless, it is possible that the short paraphrase was chosen to deemphasize the pretrial criminal procedure content of "the law of the land" so as to give more visibility to the protection of property interests. By 1787, Madison and other members of the American elite had become concerned with the potential that radically populist state legislatures might disappropriate property or forgive debts.⁴⁷⁷ That had been the nature of the New York controversy that occurred earlier in 1787. That concern also seems to be reflected in the content of the Northwest Ordinance's bill of rights; although that bill was quite brief overall, it nevertheless included a takings clause and a non-interference with contract clause immediately after the "law of the land" provision.⁴⁷⁸ As a result, it is plausible that the shorter phrasing of the "law of the land" clause may have been intended to allow more emphasis on property protection.

Of course, the bill of rights in the Northwest Ordinance probably also sheds light on why Madison included the Takings Clause after the due process of law clause in the Fifth Amendment. As noted, a takings clause had been included in the Northwest Ordinance immediately after the paraphrase of

⁴⁷⁶ The fact that this bill of rights set out protections regarding bail and habeas corpus as well as the "law of the land" guarantee indicates that the drafters of the Ordinance were familiar with the historical concern of arbitrary arrest and imprisonment. Moreover, because other statements in the bill explicitly guaranteed "trial by jury" and "judicial proceedings according to the course of the common law," it seems apparent that its enactors did not regard the "law of the land" protection as a statement of trial rights. It is also significant that the Ordinance did not include any prohibition against general warrants, or any reference to "unreasonable searches and seizures."

⁴⁷⁷ See, e.g., JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* 103-04 (1998) (discussing Madison's concerns regarding the potential for majoritarian attacks on property rights).

⁴⁷⁸ See *supra* note 474.

Magna Carta 29—in fact, the “law of the land” clause was bundled together in the same sentence with the takings clause, rather than with several earlier criminal justice clauses,⁴⁷⁹ and Madison likely followed that model when he drafted the proto-Fifth Amendment. Additionally, there was a substantive link between takings and the content of Magna Carta 29. Magna Carta 29 had commanded that no man “shall be disseised of his freehold” except by “the law of the land.”⁴⁸⁰ Moreover, the broad principle of the “due process of law” provision that Hamilton had invoked in the then-recent New York controversies was that a citizen could not be subjected to a forfeiture of rights or property by punitive legislation because a forfeiture could be legally imposed only as a punishment resulting from a valid criminal prosecution⁴⁸¹ (forfeiture of property being a traditional punishment for a felony⁴⁸²). However, the prohibition against legislative forfeitures was vulnerable to subversion if a legislature could disappropriate a person’s property under another guise, such as requisitioning private property for public purposes. Hence, adding a takings provision that forbade government requisitions except in the form of valid purchases tended to reinforce the due process principle that punishments such as forfeiture of property could be imposed only through criminal justice.

4. Subsequent Congressional Action on “Due Process of Law”

The Vining committee that initially reviewed Madison’s proposals adopted his proto-Fifth Amendment with only minor changes in phrasing and made no changes to the “due process of law” clause itself.⁴⁸³ The only action by the committee that sheds any light on the Fifth Amendment was that, as noted above, it left the proto-Fifth Amendment among the provisions to be inserted into the limits on Congress’ power in Article I, while it moved the trial rights in the proto-Sixth Amendment to

⁴⁷⁹ See *supra* note 474.

⁴⁸⁰ See *supra* text accompanying note 109.

⁴⁸¹ See *supra* text accompanying note 401.

⁴⁸² See, e.g., 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 94-95 (stating that the defining feature of a “felony” was the penalty of forfeiture of one’s estate).

⁴⁸³ Compare DUMBAULD, *supra* note 62, at 210-11 (report of the Vining committee) with *id.* at 206-07 (Madison’s proposals).

the proposed revision of Article III.⁴⁸⁴ Thus, it appears that the Vining committee also understood that “due process of law” referred at least primarily to pretrial rather than trial procedure.

The debate on the proposed rights amendments in the full House during August 1789 sheds no further light. Although some small clarifications were made in other provisions of the proto-Fifth Amendment, there is no record of any debate or discussion regarding the “due process of law” clause itself.⁴⁸⁵ Similarly, the Senate made no change in that clause, and the meager records of the Senate debate do not indicate whether it was discussed.⁴⁸⁶

There was one late legislative development that affected the final text of the Fifth Amendment—the addition of the Grand Jury Indictment Clause. On its face, this addition presents a bit of a puzzle. As quoted above, in 1787 Alexander Hamilton had followed Coke in defining “due process of law” primarily in terms of the requirement of a grand jury indictment as a requisite for a criminal conviction. Thus, the Fifth Amendment “due process of law” clause already contained an implicit grand jury indictment requirement. Why was a seemingly redundant Grand Jury Indictment Clause added as well?

As quoted above, Madison’s proposal for the proto-Fifth Amendment had not included the opening Grand Jury Clause; rather, he had located that clause in his proposals to revise and expand the Criminal Jury Trial Clause in Article III. Given the format in which he proposed his amendments, the “due process of law” clause in the proto-Fifth Amendment prohibited Con-

⁴⁸⁴ *Id.* at 211-12.

⁴⁸⁵ See 5 BERNARD SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS* 1111 (1980) (reprinting the House debate and indicating discussions of the language in the double-jeopardy and self-accusation clauses but not recording any discussion of the due process of law clause). See also Davies, *Fifth Amendment*, *supra* note 19, at 1009-18 (discussing the insertion of “in any criminal case” in the ban against compelled self-accusation).

⁴⁸⁶ The entire record of the discussion of the proto-Fifth Amendment in the Senate is as follows:

The eighth article [proto-Fifth Amendment] was then considered, and after a successful motion to strike out these words: “except in case of impeachment, to more than one trial, or one punishment”; and substitute these words: “be twice put in jeopardy of life or limb by any public prosecution”; it was agreed to.

Senate Journal (August-September, 1789), in 5 SCHWARTZ, *supra* note 485, at 1149.

gress from disturbing the grand jury indictment requisite, while the grand jury provision in the revision of the Criminal Jury Trial Clause in Article III would have also precluded judicial relaxation of that requisite. However, when the decision was made to set out the Bill of Rights in a “supplementary” format, Madison’s proposed revision of Article III was restated as an additional proposed amendment. Although the House endorsed that amendment and included it among those sent to the Senate, the Senate rejected almost all of it—except for the Grand Jury Indictment Clause and the exemption for military justice. There is no legislative record as to why those aspects were retained. I speculate that the Grand Jury Indictment Clause may have been viewed as being of such importance that it deserved explicit inclusion,⁴⁸⁷ and that clause may have also provided a convenient textual vehicle for inserting the necessary exemption for military justice.⁴⁸⁸ Whatever the precise motivation, the in-

⁴⁸⁷ This was the only criminal procedure amendment proposed by the Massachusetts ratification convention. *See supra* text accompanying note 420.

⁴⁸⁸ The inclusion of the Grand Jury Clause at the outset of the Fifth Amendment now tends to obscure the point that the later “due process of law” clause itself made a grand jury indictment a requisite of a valid felony prosecution. Indeed, a century after the framing, the Supreme Court opined that the initial Grand Jury Clause demonstrated that the “due process of law” clause in the Fifth Amendment could not have been meant to require grand jury indictment, because the Framers would not have included redundant provisions. *See infra* text accompanying note 617. However, that ignores the convoluted route by which the Grand Jury Clause arrived in the Fifth Amendment.

As noted above, several states had previously called for a specific guarantee of grand jury indictment. Indeed, that was the only criminal procedure provision that the Massachusetts ratification convention had called for. Madison complied by including a grand jury indictment requirement in his proposed revision and expansion of the Criminal Jury Trial Clause in Article III. That clause also served the purpose of defining the scope of the grand jury indictment requirement to include only “all crimes punishable with loss of life or member”—that is, felonies. (In contrast, the Massachusetts and New York proposals for amendments had called for grand jury indictment as a requisite for “all” federal trials.) Additionally, Madison’s proposed grand jury clause (for his proposed revision of Article III) also excepted impeachments and military justice. The Vining committee changed the language defining the scope of the indictment requirement to reach only cases involving “a capital, or otherwise infamous crime.” *See DUMBAULD, supra* note 62, at 212.

After the House decided to scrap the original plan of inserting rights amendments into the text of the Constitution itself and instead decided to use the supplementary format, the proposed revision of the Criminal Jury Trial Clause in Article III was restated as two separate amendments addressing trial provisions. What Madison had included in his proto-Sixth Amendment was again separated out from the other trial court provisions. The two proposed trial amendments read:

Article the Ninth [the proto-Sixth Amendment]:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence.

Article the Tenth:

The trial of all crimes (*except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of War or public danger*) shall be by an Impartial Jury of the Vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accostomed requisites; and *no person shall be held to answer for a capital, or otherways infamous crime, unless on a presentment or indictment by a Grand Jury*; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same State.

See DUMBAULD, *supra* note 62, at 213, 214-15 (the italicized language would become the Grand Jury Clause of the Fifth Amendment). Note that, at that stage, the Grand Jury Indictment Clause, with the definition of its scope and exceptions, was retained in the latter proposed amendment.

However, when the Senate reviewed the House proposals for amendments, it made several changes (for example, changing the language of double jeopardy to the even-then archaic formulation "be twice put in jeopardy of life or limb. . ."). See 5 SCHWARTZ, *supra* note 485, at 1149. In particular, the Senate struck almost all of the proposed amendment fashioned from Madison's proposed revision of the Criminal Jury Trial Clause in Article III (the "Article the Tenth" quoted *supra*), except for the grand jury indictment requirement and the related exceptions for military justice and less serious offenses. See *id.* at 1154 (stating that "The last named article . . ." and "the tenth article [Madison's criminal jury trial revision; see *id.* at 1123, plate 127] was stricken out"). The Senate then added the grand jury indictment requirement, along with the exception for military justice, to the beginning of the proto-Fifth Amendment proposed by the House: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury."

Unfortunately, there is no legislative record as to why the Senate deleted the bulk of that proposed amendment, or why it preserved the Grand Jury Clause itself. It is possible, however, that the clause was retained largely as a vehicle for making it explicit that indictment was only required for felonies, and as a vehicle for inserting the exception for military justice. It is noteworthy that the Senate put the Grand Jury Clause among the other pretrial provisions in the Fifth Amendment, rather than among the trial stage provisions in the Sixth Amendment. (A conference committee subsequently added back in two other aspects of Madison's proposed revision of the Criminal Jury Trial Clause: the requirement of an "impartial jury" and the venue standard that required that criminal trials be held in "the State and district wherein the crime shall have been committed." However, those provisions were inserted among the trial rights in the Sixth Amendment. Compare DUMBAULD, *supra* note 62, at 220, 221 ("Article the eighth") (Conference report), with *id.* at 218 ("ARTICLE THE EIGHTH") (Amendments passed by Senate)).

Thus, although it is true that the Grand Jury Clause added to the beginning of the Fifth Amendment was redundant insofar as the "due process of law" clause already required indictments to the extent the common law required them, it may be that the Grand Jury Clause was deemed to be such an important protection that the indictment

clusion of the Grand Jury Indictment Clause in the Fifth Amendment was something of an afterthought and did not reflect any alteration of the content of the due process of law clause itself.

5. The Federal Framers' Understanding of "Due Process of Law"

How exactly did Madison and the Federal Framers understand the contents of the "due process of law" guarantee? There is no doubt that Madison's language conveyed the basic principle that Hamilton had asserted in 1787—that an individual could be punished only through a criminal prosecution and conviction, but not by a legislative enactment. There also does not seem to be any doubt that Madison and the Federal Framers understood that the Fifth Amendment generally, and the "due process of law" clause specifically, addressed pretrial criminal procedure.

The more difficult question is whether Madison and the other Framers understood "due process of law" as actually incorporating common-law standards, including common-law arrest standards, or whether they understood the provision to merely mean that criminal prosecutions had to comport with whatever pretrial standards Congress might set. Madison's language does not answer that question: it is broad enough to include common-law protections, but it does not call attention to arrest. Likewise, the legislative history of the Bill of Rights in Congress also does not shed direct light on the question.

Nevertheless, there are grounds that suggest that the Federal Framers understood that "due process of law" connoted common-law pretrial standards. One is that the Antifederalists who agitated for a federal bill of rights had sought guarantees of

requirement should be stated explicitly. There is no reason to assume the Framers were as averse to redundancy as *Hurtado* later claimed. See *infra* note 612 and accompanying text.

Additionally, it seems likely that the Grand Jury Clause provided a convenient textual vehicle for clarifying that the indictment requirement did not extend to lesser offenses and also for inserting the exception for military justice at the outset of the criminal procedure protections: "except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war of public danger." Without the latter provision, the constitutional basis for a distinct system of military justice might have been questioned.

“common-law securities” comparable to those in the state declarations.⁴⁸⁹ Another is that Madison drafted the provisions of the Bill of Rights as limits on congressional power, and the House debated the provisions of the Bill with that understanding. Given that focus, it seems likely that “due process of law” connoted standards beyond legislative reach. Indeed, as Hamilton had previously argued, the term “due process of law” denoted judicial standards rather than legislative authority⁴⁹⁰—and judicial standards implied common law.

In addition, both the framing of the Bill of Rights and early federal legislation seem to reflect an unstated assumption that settled common-law standards and forms would continue. For example, common law still supplied the meaning of “habeas corpus” in the Suspension Clause of the Constitution. Likewise, the prohibition against excessive bail in the Eighth Amendment seems to have rested on the assumption that the common-law treatment of the availability of bail would continue. Similarly, as I discuss below, the statement of warrant standards in the Fourth Amendment appears to rest on the assumption that warrants would be required to justify house searches, and common law was the source of the privilege of the house. Thus, it seems likely that the Federal Framers, like the State Framers, assumed that common-law standards for warrantless arrests would continue when they framed the Fifth Amendment’s “due process of law” clause.

However, it must be conceded that other facts call that inference into question. The fact that Madison chose an extremely brief paraphrase of Magna Carta 29 that did not contain any term that specifically referred to arrest—and that no one attempted to add such a term during the deliberations in Congress—raises a serious question as to whether warrantless arrests were a matter of much concern during the federal framing. Indeed, the framing of the Federal Bill occurred in a different situation from that in which the state declarations had been framed. At the time of the state framings, revolutionary Amer-

⁴⁸⁹ See *supra* note 412 and accompanying text; see also notes 263-65 and accompanying text.

⁴⁹⁰ See *supra* text accompanying note 401.

ica was intent on demanding the immemorial rights of Englishmen to the protections of the common law, and the Cokean conception of fixed common-law rights was salient in that milieu. By 1789, however, it seems likely that ideological orientation had begun to fade. Additionally, it is far from clear that the Federal Framers would have anticipated that federal officers would be much involved in ordinary criminal law enforcement; rather, that was a matter for the states. Instead, it may have seemed that federal officers would rarely be called upon to make warrantless arrests. In that regard, it may be significant that the First Congress made provisions for federal judges to issue criminal warrants in the Judiciary Act of 1789, as well as for federal marshals to execute such warrants, but that Congress did not explicitly bestow statutory warrantless arrest authority on federal marshals.⁴⁹¹

The bottom line is that the original content of the Fifth Amendment's due process of law clause is murkier than that of the earlier state law of the land provisions. Because the Federal Framers were still conversant with the Cokean tradition of the common law, I think we can safely conclude that the Federal Framers would have located common-law arrest authority in the "due process of law" in the Federal Fifth Amendment if they had considered the question. However, we cannot be sure that they actually gave warrantless arrest authority much thought.

What can be said is that, in retrospect, the brevity of the "due process of law" provision, and the absence of any explicit

⁴⁹¹ In 1792, Congress did enact a provision conferring the same powers on federal marshals that a sheriff in the same state could exercise. Modern Supreme Court opinions and commentaries have suggested that this provision was passed for the purpose of conferring warrantless arrest authority on federal marshals, but the historical record shows that the provision, which was part of the "Militia Bill," was actually aimed at giving federal marshals the power to call out the local *posse comitatus* to enforce federal law, in the event the local sheriff refused to do so. See Davies, *Arrest*, *supra* note 3, at 355-56. There actually was no need to confer warrantless arrest authority on federal marshals by statute in 1792, because *any person* could make a warrantless arrest if a felony had been committed and the person had probable grounds to suspect the arrested person. See *supra* text accompanying notes 221-22. Nevertheless, when state courts and legislatures began to confer broader warrantless arrest authority on peace officers (but not private persons) during the nineteenth century (as described *infra* Part V) it appears that the 1792 statute had the effect of also conferring that broader warrantless arrest authority on federal officers.

reference to arrest in that clause, almost certainly exposed the warrantless arrest standards in the traditional Cokean understanding of "due process of law" to subsequent loss or distortion.⁴⁹² Additionally, as I explain below, a change in the final ordering of the Amendments may also have undermined the traditional understanding of "due process of law."⁴⁹³

E. The Framing of the Fourth Amendment

As I have already previewed in Part II, the framing of the Fourth Amendment was a simpler and more straightforward matter than that presented in the conventional history of search and seizure. Like the earlier state warrant provisions, the Fourth Amendment simply banned too-loose warrants. However, it is worthwhile to reiterate several aspects of that story which underscore that the Amendment was focused on warrant standards. It is also worthwhile to address one point that the conventional history has ignored—the novelty of the "probable cause" standard for warrants.

It appears that concern with general warrants waned in the years immediately after the Revolution. Although the state declarations adopted from 1776 to 1784 had included bans against too-loose warrants, the New York legislature did not include a warrant standards provision in the declaration of rights it adopted in 1787, and neither did the Continental Congress when it included a short bill of rights in the Northwest Ordinance in that same year. The likely reason is that the illegality of general warrants seemed completely settled.⁴⁹⁴

⁴⁹² At least one state legislature seems to have anticipated this vulnerability. When the Virginia Legislature ratified the Bill of Rights in 1791, it proposed that a fuller rendition of Magna Carta 29—which, among other things, would have included the terms "taken" and "imprisoned"—should be included in a more expansive Federal Bill of Rights. MOTT, *supra* note 91, at 159 n.68.

⁴⁹³ See *infra* notes 530-36 and accompanying text.

⁴⁹⁴ The broad acceptance of the illegality of general warrants is demonstrated by the earliest reported state search and seizure decision, *Frisbie v. Butler*, 1 Kirby 213 (Conn. 1785), in which the Connecticut Supreme Court ruled that a warrant to search an entire village for a stolen pig was illegal. The fact that this decision was rendered in a court in a state that had not adopted a constitutional ban against general warrants demonstrates the general acceptance of the illegality of general warrants at common law. *Frisbie* is the earliest reported case because Kirby's reports were the first substantial set of state court reports to be published in an American state.

However, during the ratification debates of 1787-1788, the Antifederalists revived fears that the new Congress might authorize general warrants for customs and excise searches.⁴⁹⁵ The significant feature of the discussions of general warrants during the ratification debates is that they fed off the larger fear of federal taxation; the concerns that were expressed were about revenue searches—criminal arrests or search warrants were rarely mentioned.⁴⁹⁶

Given the Antifederalist fear-mongering over federal revenue collections, it is unsurprising that the state ratification conventions included a ban against general warrants among their proposals for a federal bill of rights. Notably, however, even as late as 1788, several of those proposals still omitted any preamble reference to a right against “unreasonable searches and seizures.”⁴⁹⁷ The later Antifederalist proposals from the crucial states of Virginia and New York did include that preamble, but

⁴⁹⁵ See *infra* note 570.

⁴⁹⁶ There were a few instances in which Antifederalists mentioned criminal warrants. For example, during the Virginia ratification convention, Patrick Henry complained that the Constitution insufficiently protected personal rights:

[f]or instance, general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here than they have in England, because there, if a person be confined, liberty may be quickly obtained by the writ of habeas corpus. But here, a man living many hundred miles from the judges may get in prison before he can get that writ.

See 3 ELLIOT'S DEBATES, *supra* note 263, at 588. Note that there is a peculiarity in Henry's argument insofar as he focused on the difficulty of obtaining a writ of habeas corpus (which could be issued only by judges of the then central court in Richmond), but seems to have assumed that a writ would issue because an arrest on a general warrant would be illegal. See also *supra* note 411.

Similarly, an Antifederalist pamphleteer also pointed out that a trespass action for damages could be brought if “a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman.” Essay of a Democratic Federalist, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 415, at 58, 61 (discussed in Davies, *supra* note 2, at 588-89 n.100). However, that reference also seems to have assumed that the illegality of such a search was a given.

⁴⁹⁷ See *supra* text accompanying note 418 (Pennsylvania Minority); see also *supra* text accompanying note 423 (Maryland).

still addressed only warrant standards under that rubric.⁴⁹⁸ Consistent with the specific fears regarding federal revenue searches, however, those ratification convention proposals did not integrate the calls for bans against general warrants into the larger set of criminal procedure provisions, but simply tacked on the provisions banning general warrants at the end of those provisions. For example, the New York ratification convention proposals set out the criminal procedure provisions in a clear procedural sequence: arrests, double-jeopardy, habeas corpus, bail, and trial rights—and only then set out the ban against general warrants.⁴⁹⁹ The likely explanation is that the warrant provisions were understood to deal more with customs searches than criminal procedure.

1. Madison's Draft

Madison plainly recognized the public concern over general warrants because several of his letters mentioned “security against general warrants” as one of the essential provisions that had to be included among the rights amendments (although he does not seem to have used the shorthand label of “unreasonable searches and seizures” in his correspondence, or to have expressed any concern with warrantless intrusions).⁵⁰⁰ Similarly, he specifically referred to the need to ban “general warrants” at least once, and possibly twice, during his speech to the House proposing a bill of rights and raised the possibility that a future Congress might think general *customs* search warrants were authorized as “necessary and proper” for *revenue* collection.⁵⁰¹

Madison's focused concern with banning general warrants is also evident in the language and format of his proposed proto-Fourth Amendment:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unrea-

⁴⁹⁸ See *supra* text accompanying note 429 (Virginia); see also *supra* text accompanying note 436 (New York).

⁴⁹⁹ See *supra* note 456.

⁵⁰⁰ See Davies, *supra* note 2, at 699-700, n.435.

⁵⁰¹ See *id.* at 699-700 n.435, 701 n.439.

sonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.⁵⁰²

Three aspects of the text of Madison's proto-Fourth Amendment merit specific attention: (1) its one-clause format; (2) its reference to a collective right of "the people"; and (3) its novel use of "probable cause" as a warrant standard.

a. Single-clause format. As noted in Part II, Madison's single-clause provision plainly did not address anything beyond the standards for valid warrants: the only violation of the right against "unreasonable searches and seizures" that it forbade was "by warrants issued . . ." Thus, as previous commentators have usually conceded, Madison's text applied the term "unreasonable searches and seizures" only to invalid warrants.⁵⁰³ Madison did not use that label in a way that suggested he meant to create a "reasonableness" standard that was distinct from the warrant standards of cause and particularity. Indeed, unlike the earlier Pennsylvania and Massachusetts warrant provisions, he did not even set out the prefatory statement of the right involved in a separate clause or sentence (probably because he disliked the "therefore" formulation⁵⁰⁴). Thus, it is apparent that Madison did not apply "unreasonable searches and seizures" to anything other than searches or arrests under too-loose warrants.

b. "The rights of the people." Madison also made a significant drafting choice when he phrased the proto-Fourth Amendment as a protection of "the rights of the people" (as in the 1776 Pennsylvania declaration) instead of stating it as a right of an individual person (as in the 1780 Massachusetts declaration and the Virginia and New York ratification convention proposals).⁵⁰⁵ Although there is no direct evidence as to why Madison made that choice, his contrasting use of the collective term "the peo-

⁵⁰² See *supra* text accompanying note 455.

⁵⁰³ See *supra* note 72. See also Davies, *supra* note 2, at 699 n.434.

⁵⁰⁴ See Davies, *supra* note 2, at 697 n.433.

⁵⁰⁵ See *supra* text accompanying notes 331 (Pennsylvania declaration), 356 (Massachusetts declaration), 429 (Virginia ratification convention proposals), and 436 (New York ratification convention proposals).

ple" in the Assembly and Petition Clause of the First Amendment, in the Second Amendment,⁵⁰⁶ and in the Fourth Amend-

⁵⁰⁶ U.S. CONST. amends. I, II.

The collective character of "the right of the people peaceably to assemble" set out in the First Amendment is evident. Moreover, although an individual would have possessed a right to petition the government, the historical controversies regarding that right had involved limitations imposed on the number of persons who could join a petition. See SOURCES, *supra* note 104, at 228-30, 426. Indeed, Madison's original proposal clearly addressed a collective right to petition: "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances." See *id.* at 422. Thus, the First Amendment primarily addressed a collective right to petition that was linked to the right to assemble.

The collective character of the right "of the people" to bear arms in the Second Amendment is also evident. Although it is possible that some of the *state* constitutions may have been intended to preserve a personal right to possess weapons, the legislative history of the Second Amendment indicates rather clearly that the *Federal Framers* were concerned with ensuring the continued existence of the state militias, in large part because they were fearful of a standing federal army. Hence, it does not appear that the Federal Framers intended to create a personal right to possess weapons. Indeed, given that the Federal Bill was drafted and adopted in the aftermath of events such as Shay's Rebellion, it is plausible that the Federal Framers might have been hesitant to adopt a right to bear arms outside of the structure of the organized militias.

That is not to say that there is no evidence of a personal right in the legislative history of the Second Amendment. Early on, in December 1787, the Antifederalist minority in the Pennsylvania ratification convention did call for an amendment that would have set out both a collective and personal right to arms:

7. That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

See DUMBAULD, *supra* note 62, at 174. Similarly, the New Hampshire convention also called for an amendment that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." See *id.* at 182.

However, the significant fact is that the reference to a personal right was omitted from the later and more influential state proposals for federal amendments. For example, in June 1788, the Virginia ratifying convention proposed only a collective right of the people to bear arms that was linked to the preservation of the militia:

Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural, and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the civil power.

ment, but of individualized references to “the Owner [of a house]” in the Third Amendment, to a “person” in the Fifth Amendment (including the “due process of law” clause), and to “the accused” in the Sixth Amendment,⁵⁰⁷ strongly suggests that his choice of the collective “people” for the Fourth Amendment was deliberate. The apparent explanation for his choice of “the people” is that a shared right made the most sense in a provision that banned unparticularized general warrants because such warrants threatened the entire community rather than only a particular individual. Thus, that choice comported with

See id. at 185. The New York convention proposed a comparable collective protection. *See id.* at 189-90 (proposals unnumbered). North Carolina did likewise. *See id.* at 198, 201 (“17th” proposal).

Madison’s proposal for the proto-Second Amendment was also formulated as a collective right; indeed, it juxtaposed the collective “right of the people” to bear arms to preserve the militia against a personal right to conscientious objection to military service: “The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” *See id.* at 207. The inclusion of the conscientious objector provision also underscored the military orientation of the provision.

The Vining committee made the linkage of the bearing of arms to the militia even more apparent by rearranging the ordering of Madison’s clauses to begin with a reference to the importance of the militia. Thus, the militia became the premise for the subsequent statement of the collective right to bear arms: “A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms.” *See id.* at 210-11.

The House passed this proposed amendment with only a slight modification of the conscientious objection clause. *See id.* at 213-14 (“Article the Fifth”). The Senate then changed the militia’s “being the best security” to “being necessary to the security” and deleted the conscientious objector clause altogether. The Second Amendment was then adopted and ratified in the Senate’s language: “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.” *See id.* at 217 (Amendments passed by Senate); *see also id.* at 220 (“Article the fourth”; Amendments proposed to the States).

The phrase “well regulated Militia” is also significant. The militia was not an informal body; rather, state statutes closely organized and regulated the structure and armaments of the militia, including the nature of the military weapons to be used. For example, a 1784 Virginia statute provided that officers were to be armed with swords, and privates with a musket and bayonet, but allowed privates the use of rifles rather than muskets in the frontier militia units. *See An Act for Amending the Several Laws for Regulating and Disciplining the Militia, and Guarding Against Invasions and Insurrections* (Oct. 1784), *reprinted in* 11 HENING’S STATUTES AT LARGE, at 478-79 (1823).

⁵⁰⁷ *See* U.S. CONST. amends. III, V, VI.

the understanding that the proto-Fourth Amendment was focused on banning too-loose warrants.⁵⁰⁸

c. “*Probable cause.*” Madison innovated when he used “probable cause” as the standard for federal warrants. The earlier state provisions had all made some showing of individualized cause a requirement for the issuance of warrants, but they had not settled on any precise statement of that standard. Virginia had used the rigorous traditional common-law standard of “evidence of a fact committed,”⁵⁰⁹ but later declarations—perhaps recognizing the varied legal requirements for different kinds of warrants—had simply required “an oath” or “sufficient foundation.”⁵¹⁰ Madison innovated by stating a different, specific cause requirement—“probable cause.”

As discussed above, “probable cause” alone did not constitute the common-law standard for a criminal *search* warrant; rather, the common-law standard for a warrant to search for stolen goods required both (1) a sworn charge that a theft (felony) had been committed in fact, and (2) reasonable or probable cause of suspicion as to where the stolen property was located.⁵¹¹ Felony arrest warrants had also once required both of those prongs, but the requirement of a crime-in-fact had become somewhat unsettled.⁵¹² However, there was one area of law in which “probable cause” alone had plainly emerged as sufficient cause for the issuance of a search warrant—customs law.

An early eighteenth century English statute had introduced “probable cause” as a standard for issuance of an excise search

⁵⁰⁸ Justice Scalia asserted in his concurring opinion in *Minnesota v. Carter*, 525 U.S. 83, 92-94 (1998), joined by Justice Thomas, that the use of the possessive “their . . . houses” in the text of the Fourth Amendment indicated that the Framers intended for the Amendment’s protections to apply only to the residents of a house, but not to invited guests. However Justice Scalia ignored the collective nature of a right of the “people” and even the collective aspect of “their houses” as opposed to “his house.” See also Davies, *Arrest*, *supra* note 3, at 262-64, n.66.

⁵⁰⁹ See *supra* text accompanying note 309.

⁵¹⁰ See, e.g., *supra* text accompanying note 316 (Maryland), and text accompanying note 360 (Massachusetts).

⁵¹¹ See *supra* notes 152, 222, 239 and accompanying text and note 257. See also NELSON, *supra* note 28, at 99 (noting the application of theft-in-fact requirement for the issuance of search warrants in early nineteenth century Massachusetts).

⁵¹² See *supra* text accompanying notes 189-91, 232-37.

warrant in England.⁵¹³ In addition, the 1764 Sugar Act made “probable cause” a defense that revenue officers in the American colonies could raise if they were sued for unlawful customs seizures.⁵¹⁴ At that time, Americans protested the relaxation of the traditional rule that any erroneous revenue seizure was an actionable trespass. Notably, George Mason, the author of the 1776 Virginia Declaration, had condemned that standard by asserting that the term “probable cause” was “unknown in the language and style of Laws.”⁵¹⁵

However, the attitude of the American political elite toward “probable cause” seems to have softened when the revenues were being collected to finance American governments rather than that in London. As a practical matter, although the criminal search warrant requirement of crime-in-fact was workable in instances where a victim of theft would act as a complainant, it presented an obstacle to enforcement of complainantless offenses, such as smuggling, that depended on investigation by officers.⁵¹⁶ Perhaps for that reason, a 1786 Pennsylvania customs statute had authorized customs search warrants for a national customs collection to be based on “probable cause.”⁵¹⁷

Because Madison was knowledgeable about customs law (he had drafted a 1787 Virginia customs statute⁵¹⁸), it is highly likely that he was aware of the Pennsylvania statute, and virtually certain that he was aware that “probable cause” had be-

⁵¹³ See Davies, *supra* note 2, at 703 n.446. The rationale for allowing customs search warrants to be issued on a more relaxed standard than search warrants for stolen property appears to have been that the collection of government revenue was deemed to be of greater importance than the recovery of private property. See Davies, *supra* note 2, at 703 n.446 (discussing a 1785 statement by Lord Mansfield).

⁵¹⁴ See *id.* at 653 n.295.

⁵¹⁵ See Davies, *Arrest*, *supra* note 3, at 370 n.451. Note that Mason’s opposition to probable cause may have influenced the inclusion of the rigorous “evidence of a fact committed” standard in the warrant provision added to the 1776 Virginia declaration. See *supra* text accompanying note 309. See also NELSON, *supra* note 28, at 17-18 (quoting a colonial Massachusetts court record that “Probable Cause [was] no Excuse to a[n] officer making a Seizure”).

⁵¹⁶ The customs collections statutes passed by the First Congress followed English precedents in providing that a court that decided that a revenue seizure was invalid could immunize the officer from trespass liability by issuing a certificate that “there was reasonable cause of seizure.” See Davies, *Arrest*, *supra* note 3, at 371 n.455.

⁵¹⁷ See Davies, *supra* note 2, at 703, n.444.

⁵¹⁸ See *id.* at 703 n.443.

come the usual standard for customs searches and seizures. Additionally, because customs collections and excise taxes were to be the principal sources of revenue for the new national government,⁵¹⁹ it seems likely that he and the other Framers would have been particularly concerned to address customs searches—both because such searches were a specific subject of Antifederalist agitation and because customs searches were the most likely kind of searches that federal officers would conduct. Thus, it is quite possible that Madison chose to use the plain “probable cause” standard (without the requirement of actual crime) in the Fourth Amendment because it had become the customs search warrant standard, even though it was not as rigorous as the common-law standard for criminal search warrants. (Notably, however, state warrant provisions adopted after the ratification of the Fourth Amendment did not consistently adopt “probable cause”; instead, some continued to use the common-law “evidence of a fact committed” standard.⁵²⁰)

2. Subsequent Legislative History

The Vining committee that reviewed Madison’s proposals for amendments made a variety of language changes in his proto-Fourth Amendment when it reported to the House of Representatives but, despite the attention the committee members paid, they did not alter his one-clause format, his use of the collective term “the people,” or his use of the probable cause standard.⁵²¹ Hence, it appears that the committee also understood

⁵¹⁹ See Davies, *Arrest*, *supra* note 3, at 371 n.452.

⁵²⁰ See Davies, *supra* note 2, at 704 n.449 (noting that Pennsylvania revised its warrant provision to include “probable cause” in 1790; that Kentucky used that standard in 1792; that Indiana did so in 1816; that Mississippi did so in 1717; but that Tennessee used the “evidence of a fact committed” standard in 1796, and that Illinois did so in 1818; but that Ohio attempted to combine the standards by adopting “probable evidence of a fact committed” in 1802).

⁵²¹ The changes the Vining committee made can be identified by comparing Madison’s proposal, set out *supra* text accompanying note 502, with the proposal the committee reported:

The right of the people to be secure in their person, houses, papers, and effects, shall not be violated by warrants issuing, without probable cause supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized.

that the proto-Fourth Amendment was concerned only with warrant standards and primarily with customs search warrants.

During later proceedings in the House, however, two further changes were made. Although neither of the changes would have significantly altered the meaning of the text at the time, they both later facilitated the modern reinvention of the Fourth Amendment. One was a change in Madison's phrasing that had the side-effect of dividing the proto-Fourth Amendment into two clauses. The other was a last-minute reordering of the proposed amendments that moved the proto-Fourth Amendment ahead of the proto-Fifth Amendment.

a. "[A]nd no Warrant shall issue." In August 1789, during the House consideration of the proposals for amendments, Madison's phrase "by warrants issuing" was replaced with the words "and no warrant shall issue." As a result of this change, the proto-Fourth Amendment became the final two-clause Fourth Amendment:

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and no Warrants shall issue*, but upon probable cause, supported by Oath or affirmation, and

See DUMBAULD, *supra* note 62, at 211. The most glaring departure from Madison's proposal was that the committee report itself omitted the words "all unreasonable searches and seizures." It appears, however, that this omission was only a typographical accident. It was later referred to as a "mistake" during the House debate (probably by Egbert Benson, a member of the committee), and the language was reinserted by motion—except that the word "all" was again omitted. See Davies, *supra* note 2, at 715. Note that the fact that Benson failed to reinsert the word "all" would seem to cut against any notion that the Fourth Amendment was meant to be a comprehensive search-and-seizure provision that would extend beyond warrant standards themselves.

In addition, the Vining committee made a number of small changes in Madison's proposed language: Madison's by warrants "issued" became "issuing"; Madison's plural "rights" of the people became "right"; Madison's "to be secured" became "to be secure"; Madison's "their other property" became "effects"; and Madison's repetitive "their" in "their persons, their houses, their papers, and their other property" was dropped so that the formula became "their person, houses, papers, and effects." Additionally, Madison's use of "or not" ahead of the particularity requirement became "and not," and his "or" in "places to be searched, or the persons or things to be seized" became "and."

particularly describing the places to be searched, and the persons or things to be seized.⁵²²

As discussed in Part II, the modern interpretation that assigns a broad "reasonableness" standard to the Fourth Amendment is totally dependent upon this small change in language.⁵²³ Lasson, for example, asserted that: "[t]he provision as [the movant] proposed it contained *two* clauses. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus *intentionally* given a broader scope."⁵²⁴ However, there is not a shred of evidence of any such "intention."

The only statement in the records of the House debate regarding the *purpose* of this change indicates that the movant, probably Eldridge Gerry rather than Egbert Benson,⁵²⁵ proposed this substitution simply to insert a clearer command that too-loose warrants not be issued at all:

Mr. [Gerry] objected to the words "*by warrants issuing.*" This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "*and no warrant shall issue.*"⁵²⁶

Gerry did not voice a general objection. Rather, he objected only to the "declaratory" reference to "warrants issuing" and simply tweaked that language into an imperative command that "no warrant shall issue." There was nothing novel about the resulting text; the prior state warrant provisions and proposals had explicitly commanded that too-loose warrants "ought not be

⁵²² U.S. CONST. amend. IV (emphasis added). This is largely the same text the House submitted to the Senate, see DUMBAULD, *supra* note 62, at 213-14 (art. 7); the same text passed by the Senate, see *id.* at 217-18 (art. 6); and the same text ultimately submitted to the states for ratification, see *id.* at 220-21 (art. 6). Note, however, that this final text includes a few additional changes made in the House in the warrant standards—specifically "without" was changed to "but upon" and "and not" was changed to "and." These changes were the product of another motion passed after the change had been made from "by warrants issuing" to "and no warrant shall issue." See Davies, *supra* note 2, at 719 n.486.

⁵²³ See *supra* notes 60-73 and accompanying text.

⁵²⁴ LASSON, *supra* note 45, at 103 (second emphasis added).

⁵²⁵ See *supra* note 80.

⁵²⁶ See LASSON, *supra* note 45, at 101 (quoting ANNALS OF CONGRESS) (emphasis added; "Gerry" substituted for "Benson" as the movant).

granted.”⁵²⁷ Gerry simply made the Fourth Amendment conform to the imperative formulation of the earlier state warrant provisions and proposals (and used Madison’s “shall” rather than the earlier “ought”⁵²⁸).

Thus, the resulting division of the text into two clauses was nothing more than a by-product of Gerry’s inserting imperative language in the simplest way. Nothing in the records of the House debate even hints that the change was made for the purpose of expanding the reach of the proposed Fourth Amendment beyond setting standards for the issuance of warrants.

Indeed, to the extent that the Federal Framers were actually concerned with warrantless arrests, it seems quite probable that they would have understood that that concern fell within the Cokean conception of “due process of law”—and they had already included that protection in the proposed Fifth Amendment which, following Madison’s ordering, they had previously debated and approved before taking up the Fourth Amendment.⁵²⁹ Thus, the members of the House would not have had any reason to address warrantless intrusions under the rubric of “unreasonable searches and seizures” in the Fourth Amendment.

b. Reordering of the proposed amendments. The other change that occurred during the proceedings in the House related to the ordering of the proposed amendments. During the deliberations, the proposed criminal procedure amendments had been debated in the order Madison had proposed: the proto-Fifth Amendment (including “due process of law”) came first, then the proto-Eighth Amendment (probably because it addressed bail), then the proto-Fourth Amendment, and finally the proto-Sixth Amendment, which set out trial rights.⁵³⁰ In that order, it was still fairly apparent that the Fourth Amend-

⁵²⁷ The only variation was the 1780 Massachusetts provision which initially condemned too-loose warrants as being “contrary to this right” but then subsequently ordered that nonconforming warrants “ought not be granted.”

⁵²⁸ Notwithstanding occasional claims to the contrary, “ought” was as imperative as “shall” in 1789. See *supra* note 305.

⁵²⁹ HOUSE OF REPRESENTATIVES JOURNAL, Aug. 19-20, 1789, reprinted in 5 SCHWARTZ, *supra* note 485, at 1122-23.

⁵³⁰ *Id.*

ment was distinct from the provisions in the Fifth Amendment that related to the initiation of a criminal prosecution.

However, at the end of the House deliberations on proposed constitutional amendments, a three-person committee on style, chaired by Egbert Benson, was charged with putting the proposed amendments in final form for submission to the Senate.⁵³¹ That committee moved the proto-Fourth Amendment ahead of the proto-Fifth Amendment, and also moved the proto-Eighth Amendment (which banned excessive punishment as well as excessive bail) back after the criminal trial proposals in the proto-Sixth Amendment and even after the provision for jury trials in civil cases in the proto-Seventh Amendment.⁵³²

This is among the most undocumented features of the legislative history of the Bill of Rights. There is no record of any deliberation by the Benson committee and, although records indicate the committee reported to the House, there is no record as to what, if any, explanation it rendered regarding the changed ordering.⁵³³ We can reconstruct what the committee did only by comparing the order in which the proposed amendments were deliberated in the House⁵³⁴ to the version actually submitted to the Senate.⁵³⁵

On its face, it appears that the Benson committee organized the proposed amendments according to a procedural sequence, but that it characterized the salient contents of the various amendments differently than Madison and the Vining committee had. It seems likely that the Benson committee put the Fourth Amendment ahead of the criminal procedure provisions in the Fifth and Sixth Amendments because, if there were a warrant in a criminal case, it likely would be the first occurrence in the proceedings. It also seems likely that they moved

⁵³¹ The committee was composed of Benson, Sherman, and Sedgwick. See LASSON, *supra* note 45, at 101 n.81.

⁵³² See DUMBAULD, *supra* note 62, at 213-16.

⁵³³ See, e.g., 5 SCHWARTZ, *supra* note 485, at 1121-22; see also *id.* at 1133-38 (reprinting the record of the House debates and showing the appointment of the three-person Benson committee on Saturday, Aug. 22, 1789, and noting its report on Monday, Aug. 24, 1789, but not indicating anything further except approval of the message transmitting the proposed amendments to the Senate).

⁵³⁴ See *supra* note 529.

⁵³⁵ See DUMBAULD, *supra* note 62, at 213-16.

the Eighth Amendment back after the provisions dealing with criminal and civil trials in the proto-Sixth and proto-Seventh Amendments because it dealt with fines and punishments as well as bail, and punishments came after trials. The bottom line, however, is that we really do not know why the Benson committee did what it did.

The Senate subsequently made no changes to either the language of the Fourth Amendment or the Benson committee's ordering of the provisions. Thus, the Fourth Amendment took its place ahead of the "due process of law" provision in the Fifth Amendment.⁵³⁶ It is doubtful this change in the ordering of the Amendments would have seemed significant in 1789. However, in retrospect, this change gave the Fourth Amendment more of the appearance of a criminal procedure amendment than of a provision primarily concerned with search warrants. That shift, in turn, later facilitated the invention of modern Fourth Amendment doctrine and, ultimately, the inclusion of warrantless intrusions in its scope.

F. Summary

In sum, there is clear evidence that the Federal Framers did not intend to address warrantless arrest authority in the Fourth Amendment; that the Fifth Amendment, including the "due process of law" clause, was understood to generally address pretrial criminal procedure; and that the "due process of law" clause at least required compliance with the legal standards for arrest. However, the legislative history of the Fifth Amendment does not provide us with explicit evidence as to whether the Federal Framers sought to fix the content of those legal requisites. In particular, it does not tell us directly whether the Federal Framers actually intended to constitutionalize common-law warrantless arrest standards in the "due process of law" clause. Indeed, because it is unlikely that the Federal Framers expected that federal officers would engage in ordinary law enforcement, it may well be that the Federal Framers gave less attention to warrantless arrest authority than the State Framers had. The

⁵³⁶ See *id.* at 217-19.

lack of direct statements about the contents of the warrantless arrest standards in the Fifth Amendment, like the absence of any statement regarding when warrants were required in the Fourth Amendment, probably reflects the degree to which the Federal Framers went about their work with the implicit assumption that settled common-law rules would continue to control such topics—but they did not articulate that assumption.⁵³⁷

What is clear, however, is that, whatever the Federal Framers may have thought or intended with regard to these matters, the Cokean understanding of “due process of law,” and the inclusion of warrantless arrest standards in that conception, was lost during later decades. That loss, in turn, cleared the way for state judges to relax the earlier common-law warrantless arrest standards and drastically expand government investigatory powers. Likewise, that loss later opened the way for the Federal Supreme Court to invent modern search-and-seizure doctrine by reconstruing the Fourth Amendment as though it had been intended to be a comprehensive search-and-seizure provision based upon a “reasonableness” standard.

V. THE POST-FRAMING TRANSFORMATION OF CRIMINAL PROCEDURE

The post-framing history of search-and-seizure doctrine is a large and complex topic that has received far less attention than the framing itself. Nevertheless, the broad outlines of the post-framing history seem clear enough. In essence, there were three stages: first, the Cokean understanding of “due process of law” was lost with the result that warrantless arrest standards were effectively deconstitutionalized; second, state courts relaxed warrantless arrest standards to facilitate a larger transformation from accusatory to investigatory criminal procedure;⁵³⁸ and, finally, the Federal Supreme Court reinvented Fourth Amendment doctrine and extended the scope of that Amendment to reach warrantless searches and, eventually, even warrantless arrests and detentions. Thus, warrantless

⁵³⁷ See *supra* text accompanying notes 28-34.

⁵³⁸ For an overview of the differences between accusatory and investigatory criminal procedure, see Davies, *Arrest*, *supra* note 3, at 421-35.

arrest standards were ultimately reconstitutionalized—but at a substantially less rigorous level.

A. *The Loss of the Cokean Conception of Due Process of Law*

The state and federal legal systems underwent substantial and increasing change during the decades that followed the framing of the Federal Bill of Rights. For one thing, the American Revolution had disrupted the bar in the various states and there seems to have been a general deterioration of the education levels and professionalism of American lawyers during the early nineteenth century.⁵³⁹ For another, Blackstone's *Commentaries* supplanted Coke's *Institutes* as the primary work for legal education, but Blackstone offered only a superficial discussion of criminal procedure generally and of warrantless arrest in particular.⁵⁴⁰ These and other changes undermined the earlier Cokean conception of "due process of law" and the warrantless arrest standards that were part of that conception.

That is not to say that the Cokean conception disappeared during the immediate aftermath of the 1789 framing of the Federal Bill of Rights. For example, the Cokean understanding of "due process of law" was still evident in Republican attacks on the constitutionality of the 1792 Alien Act.⁵⁴¹ Additionally, the

⁵³⁹ See, e.g., 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 129-72 (1965) (discussing the decline of bar organizations and professional standards during the early nineteenth century).

⁵⁴⁰ See, e.g., HOWARD, *supra* note 103, at 268-71; see also generally 4 BLACKSTONE (1st ed. 1769), *supra* note 135.

⁵⁴¹ The Alien Act of 1792 authorized the President to issue a warrant to arrest and deport any alien who was suspected of being an enemy of the United States. No commission of a crime was required. Albert Gallatin, a Republican, argued that the act was a violation of the "due process of law" clause of the Fifth Amendment because a statute giving such power to the President did not constitute "due process of law." See JAMES MORTON SMITH, *FREEDOM'S FETTERS* 43, 85 (1956). Additionally, the authorization for the President to issue a warrant appears to have been condemned as a violation of the Fourth Amendment (still referred to as Article 6 in some sources), and deportation without a trial was condemned as a violation of the jury trial rights set forth in the Sixth Amendment. See *id.* at 85-86.

This complaint was also included in the Kentucky Resolutions of 1798, authored by Thomas Jefferson. See *Kentucky Resolutions of 1798, Resolution VI*, reprinted in *DOCUMENTS OF AMERICAN HISTORY* 180 (Henry Steele Commager ed., 7th ed. 1963) (asserting that the authority conveyed to the President to imprison aliens "is contrary to the Constitution, one amendment to which has provided, that "no person shall be deprived of liberty without due process of law").

first American edition of Sullivan's *Lectures* was published in 1805, and that work repeated virtually verbatim Coke's description of the warrantless arrests that were permitted under Magna Carta 29.⁵⁴² The New Hampshire Supreme Court still consulted that treatise in 1817 when it analyzed the constitutionality of a statute that permitted warrantless arrests for traveling on the Sabbath.⁵⁴³ In 1845, the Illinois Supreme Court construed that state's due process clause to apply only to criminal but not civil procedure,⁵⁴⁴ and in 1857 the Massachusetts Supreme Judicial Court cited Coke when it ruled that that state's "law of the land" clause required that criminal prosecutions be commenced by grand jury indictment.⁵⁴⁵ Nevertheless, there are clear signs that the traditional understanding of "due process of law" was fading and being replaced by decidedly different conceptions.

This change is apparent in the state constitutions that were written or revised during the nineteenth century. The two-provision pattern of search-and-seizure provisions generally persisted, but the linkage of the "due process of law" provisions to arrest standards became attenuated. Probably because of the influence of the Federal Fifth Amendment, the state constitutions began to favor "due process of law" in place of "the law of the land." Moreover, although some states still included that provision in a larger criminal procedure article, the trend was to set out freestanding paraphrases of Magna Carta 29.⁵⁴⁶ A few states even omitted "due process" provisions based on Magna

A decade later, St. George Tucker repeated these criticisms of the Alien Act in a note he added in his annotated edition of Blackstone's *Commentaries*. 2 WILLIAM BLACKSTONE, COMMENTARIES *137 n.24 (St. George Tucker ed., 1803) (criticizing the act as unconstitutional, in part, unless "aliens are not persons" and "neither imprisonment, nor banishment, is any deprivation of personal liberty"—a criticism that clearly invoked the Fifth Amendment's command that "no person" shall be "deprived of . . . liberty" except by "due process of law"). See also *In re Dorsey*, 7 Port. 293, 303-04 (Ala. 1838) (argument of counsel).

⁵⁴² See *supra* note 257.

⁵⁴³ *Mayo v. Wilson*, 1 N.H. 53 (1871), discussed *supra* notes 379-87 and accompanying text.

⁵⁴⁴ *Rhinehart v. Schuyler*, 7 Ill. (2. Gilm.) 473, 517-18 (1845).

⁵⁴⁵ *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857).

⁵⁴⁶ See HOWARD, *supra* note 103, at 479-82 (indicating that only ten states still have due process clauses that are linked more or less explicitly to criminal procedure). See also MOTT, *supra* note 91, at 20-25, 26-27.

Carta 29 altogether.⁵⁴⁷ Meanwhile, state constitutions increasingly included warrant provisions that copied or closely paraphrased the Federal Fourth Amendment rather than the earlier state provisions.⁵⁴⁸

State courts rarely construed either of the search-and-seizure constitutional provisions during the nineteenth century. Because criminal procedure remained primarily a judicial rather than legislative matter (although states began to codify existing criminal procedure standards during the mid to late nineteenth century), and because there usually was only limited appellate review of criminal convictions, state courts were rarely called upon to assess the constitutionality of statutes that dealt with criminal procedure.⁵⁴⁹ Moreover, because misconduct by peace officers was not yet recognized as a form of governmental illegality, but was instead still treated only as a trespass for which the officer was personally liable, state courts rarely construed "due process" in a criminal justice context.⁵⁵⁰ Federal courts had even less cause to do so (although counsel invoked "due process of law" in several early nineteenth-century Supreme Court cases involving unusual forms of arrest).⁵⁵¹ That lack of construction probably hastened the loss of the earlier tradition.

⁵⁴⁷ For example, California did not adopt a due process clause until 1949, and New Jersey still does not have a due process of law or law of the land clause.

⁵⁴⁸ See Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

⁵⁴⁹ See, e.g., NELSON, *supra* note 28, at 27.

⁵⁵⁰ As noted above, constitutional provisions were not applied to the conduct of officers. See *supra* notes 268-72 and accompanying text. Rather, constitutional provisions only limited legislation. For example, in his 1829 treatise, William Rawle noted that the first eight amendments to the federal Constitution—that is, the Bill of Rights—"fall within the class of *restrictions on the legislative power*, some of which would have been implied, some are original, and all are highly valuable. Some are also to be considered as restrictions on the judicial power." However, Rawle did not mention the executive power. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 120 (2d ed. 1829, reprinted 1970) (emphasis in original).

⁵⁵¹ The federal courts were not as involved in criminal law enforcement as the state courts because federal criminal law was still quite limited. In addition, under the prevailing view, the criminal procedure provisions in the Federal Bill of Rights did not apply to the states. See *infra* note 607 and accompanying text.

Even so, it is noteworthy that counsel sometimes invoked the Fifth Amendment guarantee of "due process of law" in early Supreme Court cases involving unusual forms of "arrest." *Anderson v. Dunn*, 19 U.S. 204 (1821), involved a trespass action brought against the Sergeant at Arms for the House of Representatives for arresting and imprisoning the plaintiff for contempt of Congress on the basis of a "warrant" issued by the

Conversely, both state and federal judges began to use the terminology of "due process of law"—or more commonly, just "due process"—in civil contexts. In some instances, the phrase was used simply to refer to proper pleading and proper use of forms.⁵⁵² However, state courts also began to assess compliance with "due process" in a wide variety of matters that involved some form of government interference with, or regulation of, property interests. For example, in an 1808 Virginia case involving a dispute over an appointment of a county court clerk, one man's loss of his appointment was alleged to be a denial of "due process of law."⁵⁵³ During the same period, similar invocations of "due process of law" appeared in a few arguments in the Federal Supreme Court and also in a few of the Justices' opinions.⁵⁵⁴ Indeed, in 1857, Chief Justice Taney made a passing but

Speaker of the House. In addition to arguing that the warrant violated the Fourth Amendment because it was not based on probable cause supported by oath, *id.* at 216, counsel for the plaintiff also argued that the arrest and imprisonment violated various criminal procedure provisions of the Bill of Rights, including the "due process of law" clause of the Fifth Amendment. *Id.* at 218.

Holmes v. Jennison, 39 U.S. 540 (1840), involved the issue of whether Vermont could arrest and surrender a person for prosecution by a foreign government. Counsel for the arrestee argued that this would violate the "due process of law" clause of the Fifth Amendment. *Id.* at 554-55.

The Fifth Amendment Due Process Clause was also invoked by counsel in 1842 in *Prigg v. Pennsylvania*, 41 U.S. 539, 576-77, a case that addressed the issue of whether a Pennsylvania statute prescribing a required procedure for the return of a fugitive slave to a slave state was repugnant to the Fugitive Slave Clause in Article IV of the Federal Constitution and the 1793 Federal Fugitive Slave Act which provided for arrest of an alleged fugitive slave and removal on the basis of a certificate from a federal judge or state magistrate. In defense of the Pennsylvania procedural requisites, counsel argued that allowing arrest of a person presumed to be an escaped slave without procedural protections to ascertain whether the person was in fact a slave would be violative of the Fourth Amendment and the "due process of law" clause of the Fifth Amendment. *Id.*

⁵⁵² For example, a 1785 Virginia statute of limitations relating to the collection of debts provided that no action could be brought on an alleged loan if the alleged debtor had remained in possession for five years "without demand made and pursued by *due process of law* on the part of the pretended lender." *E.g.*, *Fitzhugh v. Anderson*, 12 Va. (2 Hen. & M.) 289, 304 (1808).

⁵⁵³ *Dew v. The Judges of the Sweet Springs Dist. Court*, 13 Va. 1, 28-29 (1808) (noting, in the opinion of Judge Tucker in a case involving a replacement of a clerk of a court, that it had been asserted that one party, Mr. Stribling, would be "turned out of office, without that due process of law, which the Constitution and the [statutes] prescribe," but rejecting that assertion because the party had not actually been denied notice of the proceeding).

⁵⁵⁴ The earliest invocation of the Fifth Amendment's "due process of law" clause in the records of the Supreme Court (putting aside a few instances in which the term "due

process" simply referred to the filing or issuance of an appropriate pleading or writ) appears in an argument that Charles Lee made in *United States v. The Schooner Betsey*, 8 U.S. 443 (1808), an appeal from a condemnation (forfeiture) of a ship. In the course of arguing that the case should not have been decided under civil-law admiralty jurisdiction, Lee argued that the claimant (owner) was entitled to trial by jury under the Fifth Amendment "due process of law" clause and the Seventh Amendment, and that the Fifth Amendment clause means "due process of the common law." *Id.* at 451. Thus, Lee seems to have treated the "due process of law" guarantee as a guarantee of jury trial at common law in a noncriminal case. *Id.* However, the Court did not address Lee's due process argument because it ruled that the case involved admiralty jurisdiction. *Id.*

The next appearance of a "due process of law" argument occurred in the 1815 argument in *United States v. Bryan & Woodcock*, 13 U.S. 374. The United States sought retroactive application of a 1792 statute giving the United States priority in bankruptcy claims. *Id.* at 379. Counsel for Bryan and Woodcock, who also had claims in the bankruptcy proceeding, argued that such an application of the statute "would be virtually taking away private 'property' without 'due process of law.'" *Id.* However, because the Court ruled that the statute was not retroactive, it did not address that issue.

In 1819, Justice Johnson's opinion for the Court in *Bank of Columbia v. Okely*, 17 U.S. 122 (4 Wheat. 235) (1819), construed Magna Carta 29, in the form of the Maryland "law of the land guarantee," to have been "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Id.* at 126. However, Johnson concluded that the clause was not violated by a summary foreclosure of a note where the debtor had agreed to such a proceeding when the note was issued. *Id.* There was also a passing reference to "due process of law" in the 1819 opinion of *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 688 (opinion of Story, J.) (describing the charter of the college as containing the crown's pledge that the college would be administered by its trustees "unless its corporate franchises should be taken away by due process of law").

In 1837, Justice Baldwin invoked the requirement of "due process of law" as a rationale for the constitutional prohibition against state legislation that would impair the obligation of a contract in his opinion in *The Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*:

The persons of the members of corporations are on the same footing of protection as other persons, and their corporate property secured by the same laws which that of individuals; 2 Co[ke's] Inst[itutes] 46, 7. "No man shall be taken," "no man shall be disseised," without due process of law, is a principle taken from magna charta, infused into all our state constitutions, and is made inviolable by the federal government, by the amendments to the constitution.

HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 134, 137 (1837) (setting out Baldwin's opinion in the *Charles River Bridge Case*, which is not included in the published report of that case that appears at 36 U.S. 420).

Compare Mott's assessment that:

. . . [d]ecisions interpreting the meaning of due process of law or the law of the land were very scattered in the early annals of the American courts. A mere handful of cases were decided in which these phrases had been considered at all, and scarcely any of these undertook to give even as much as a summary definition of their meaning . . .

MOTT, *supra* note 91, at 192.

now infamous assertion that a slave owner had been denied "due process of law" in *Dred Scott v. Sanford*.⁵⁵⁵

During this same period, state courts were occasionally called upon to construe or assess the validity of state statutes that authorized issuance of search warrants for various novel purposes.⁵⁵⁶ However, in arrest cases the state courts brushed aside claims that the state warrant provisions were meant to require use of warrants for arrest, and instead reiterated that they were meant only to set standards for the issuance of warrants.⁵⁵⁷ The occasions when federal courts addressed the Fourth Amendment also seem to have involved warrants of various types.⁵⁵⁸ Thus, the state and federal warrant provisions were construed as not reaching warrantless intrusions.

While state judges were expanding the meaning of "due process of law" in civil property litigation, commentators began to give differing accounts of the content of "due process." Some treatises continued to discuss "due process of law" in terms of criminal procedure, and even indicated that "the law of the land" and "due process of law" imposed legal requirements on arrests. For example, one 1851 treatise stated that "to arrest a man [arbitrarily] is an act which, being hidden, makes less sensation and for that cause becomes more dangerous to public liberty," and thus "[t]he constitution has wisely provided that no person shall 'be deprived of his life, liberty, or property without due process of law.'"⁵⁵⁹ However, other American commentators had already begun to assert other understandings.

William Rawle's 1829 constitutional treatise asserted that the Fifth Amendment's due process of law clause was merely a summary restatement of the other, more specific criminal pro-

⁵⁵⁵ 60 U.S. (19 How.) 393, 450 (1856).

⁵⁵⁶ See, e.g., *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841) (upholding a statute creating search warrants for lottery violations); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 28-33 (1854) (concluding that a state statute pertaining to warrants to seize liquors violated the Massachusetts provision banning general warrants).

⁵⁵⁷ See, e.g., *Wakely v. Hart*, 6 Binn. 315, 318 (Pa. 1814); *Mayo v. Wilson*, 1 N.H. 53, 59-60 (1817); *Rohan v. Sawin*, 59 Mass. (5 Cush.) 281, 284-85 (1850).

⁵⁵⁸ See Davies, *supra* note 2, at 613, n.174.

⁵⁵⁹ 1 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 90 (Philadelphia 1851).

cedure provisions set out in the Bill of Rights.⁵⁶⁰ Rawle also treated the term “unreasonable searches and seizures” in the Fourth Amendment as an implied warrant requirement for searches, but otherwise construed the Amendment as addressing only warrant standards.⁵⁶¹ Thus, Rawle did not identify any provision in the Bill as a regulation of warrantless arrest or search authority.

Justice Joseph Story gave a somewhat different interpretation in his 1833 *Commentaries on the Constitution*. Like Rawle, he treated the Fourth Amendment simply as a warrant provision,⁵⁶² but he folded the Fifth Amendment’s guarantee of “due process” into the broader guarantee of a fair jury trial⁵⁶³—a

⁵⁶⁰ Rawle discussed the specific criminal procedure protections in the Fourth, Sixth, and Eighth Amendments, and the other specific clauses in the Fifth Amendment. RAWLE, *supra* note 550, at 127-32. Rawle then wrote the following regarding the Fifth Amendment guarantee of “due process of law”:

It follows from all the antecedent precautions [that is, all of the criminal provisions in the Bill], that *no one can be deprived of life, liberty, or property, without due process of law*; and the repetition of this declaration, is only valuable, as it exhibits the summary of the whole, and the anxiety that it should never be forgotten.

Id. Rawle had served as the United States Attorney for the District of Pennsylvania and, in that position, had earlier been the prosecutor in Whiskey Rebellion trials.

⁵⁶¹ After quoting the text of the Fourth Amendment, Rawle wrote the following:

Here again we find the general terms which prohibit *all* violations of these personal rights, and of course extend to both the state and the United States.

The term *unreasonable* is used to indicate that the sanction of a legal warrant is to be obtained, before such searches or seizures are made, but when upon probable cause, supported by oath or affirmation, such a warrant is issued, not only may other effects, but the papers of the accused be taken into the custody of the law.

Id. at 127.

⁵⁶² 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 679 [§ 1902] (3d ed. 1858) (describing the Fourth Amendment as “little more than the affirmance of a great constitutional doctrine of the common law” and stating that “its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American revolution”).

⁵⁶³ Story discussed the clauses of the Fifth Amendment after discussing the trial rights in the Sixth Amendment; with regard to the due process of law clause itself, Story wrote only that it

is but an enlargement of the language of magna charta, “*nec super eum ibimus, nec super eum millimus, nisi per legale iudicium parium suorum, vel per legem terrae*,” neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. Lord Coke says, that

treatment that effectively conflated “due process of law” with the earlier usage of “due course of law”⁵⁶⁴ and ignored the placement of “due process of law” in the Fifth Amendment rather than among the trial protections in the Sixth Amendment. Thus, although Rawle and Story still associated the Fifth Amendment’s due process of law clause with criminal procedure, they both treated the clause as though it were surplusage that lacked independent content.

By the middle of the nineteenth century, however, Thomas Cooley’s 1868 treatise *Constitutional Limitations* announced a very different view of due process of law. Cooley drew on accumulating state court rulings to describe “due process” primarily as a stricture against governmental interference with property rights.⁵⁶⁵ Additionally, Cooley described the Fourth Amend-

these latter words, *per legem terrae*, (by the law of the land,) mean by due process of law, that is, without presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.

STORY, *supra* note 562, at 595 [§ 1789]. However, Story quoted Magna Carta rather selectively. While it could be said that what he quoted referred only to trial, he omitted the earlier part of Magna Carta 29 that included the statement that no man would be “taken or imprisoned” or otherwise destroyed except by the law of the land. See *supra* note 109 and accompanying text (see full text of chapter). Thus, although Story generally described the provisions of the Bill of Rights as being in affirmance of the common law, he omitted any discussion of arrest standards when discussing “due process of law” in the Fifth Amendment. However, he did discuss arrest to a limited degree in an earlier discussion of the Habeas Corpus Suspension Clause. STORY, *supra* note 562, at 236-38 [§ 1342].

Mott, however, viewed Story’s description as being incorrect insofar as it construed Fifth Amendment due process of law as a criminal justice provision, and claimed that Story “adopted the loose ideas of uncritical thinkers in this regard” and “misled the legal profession.” MOTT, *supra* note 91, at 180.

⁵⁶⁴ See *supra* note 200.

⁵⁶⁵ THOMAS COOLEY, *CONSTITUTIONAL LIMITATIONS* 351-60 (1868). Mott described Cooley’s influence as follows:

Cooley, almost single-handedly, caused a shift of emphasis from personal to property rights. The writers who preceded him had looked upon the protection of property rights by due process as distinctly subordinate to the protection of rights of person. Cooley, however, with his careful study of judicial decisions, saw that since property rights were more apt to cause litigation, the phrase was bound to become the bulwark of the propertied classes. . . . [H]e went further [than the courts] and suggested that the powers of police [that is, regulation], taxation, and even eminent domain might come under the limitation of the Fourteenth Amendment [Due Process Clause].

ment simply as a restriction on the issuance and use of warrants⁵⁶⁶ and implied the absence of constitutional standards for warrantless arrests.⁵⁶⁷

The overall effect of this diversity of views was that the earlier connection between “due process of law” and common-law warrantless arrest standards was gradually weakened and eventually severed. Moreover, because there still was no notion that the Fourth Amendment regulated more than warrant standards, that provision did not stand in for the loss of the arrest standards that had been associated with “due process of law.” The result was that the commentaries effectively deconstitutionalized warrantless arrest standards. The state courts did likewise.

*B. The Relaxation of Common-Law Warrantless Arrest
Standards and the Emergence of Investigatory
Criminal Procedure*

As noted above, the framing-era common-law standards for warrantless arrests left little room for governmental investigation of crime. Arrest authority was accusatory in the sense that it was dependent upon a named and potentially liable complainant having made (or at least being prepared to make) an accusation that a crime had actually been committed. Likewise, although constables and similar peace officers had the full power of the law when they executed a judicial warrant, in the absence of a warrant they usually had only the same arrest authority that any private person possessed.⁵⁶⁸ Thus, the framing-era constable was regarded primarily as a “ministerial” officer who carried out the commands of justices of the peace, rather

MOTT, *supra* note 91, at 185 (footnotes omitted).

⁵⁶⁶ See COOLEY, *supra* note 565, at 299-308 (discussing the Fourth Amendment under the heading of “Unreasonable Searches and Seizures” but discussing only warrant searches).

⁵⁶⁷ See *id.* at 303 (referring the reader to works on criminal procedure).

⁵⁶⁸ The principal difference was that a constable could require bystanders to assist in making an arrest, whereas a private person could not. See DAVIES, *supra* note 2, at 620-21.

than as a law enforcement officer who ferreted out crime on his own initiative.⁵⁶⁹

At common law, a warrantless misdemeanor arrest could be made only during the commission of the offense by someone who witnessed the offense; otherwise, a warrantless arrest for a misdemeanor was unlawful.⁵⁷⁰ Additionally, a warrantless felony arrest was unlawful (and thus constituted a trespass), unless the arresting person could prove at least that the felony for which the arrest was made had been committed.⁵⁷¹ That felony-in-fact standard would have been easily met in some situations—for example, when a homicide victim's body had been discovered. However, the felony-in-fact requirement may have posed special difficulties for justifying warrantless arrests for theft (the most frequently prosecuted felony) because, unless stolen goods were recovered, proof that there had been an actual theft, as opposed to some other form of loss, could be problematic.⁵⁷² Moreover, a conviction for a misdemeanor would not satisfy the felony-in-fact standard.⁵⁷³

Additionally, warrantless felony arrests were justifiable only if they were made by a person who personally had knowledge that a felony had actually been committed and personally had grounds to suspect the arrestee to be the felon.⁵⁷⁴ Other persons, including constables, could assist that person in making the warrantless arrest; however, if they did, they became as vulnerable to trespass liability as the arresting person if it turned out that the arrest was actually invalid. If the warrantless arrest was later judged to be unlawful, everyone involved in the arrest, including any constable who assisted, was personally liable for trespass damages.⁵⁷⁵

⁵⁶⁹ See *id.* at 626-27.

⁵⁷⁰ See *supra* notes 167, 223 (especially entries 4 and 5).

⁵⁷¹ See *supra* notes 152, 222, 239 and accompanying text and note 257.

⁵⁷² See *infra* text accompanying note 580.

⁵⁷³ See Davies, *supra* note 2, at 632-33 n.227.

⁵⁷⁴ See *supra* text accompanying note 224; see also Davies, *supra* note 2, at 633 n.229.

⁵⁷⁵ See NELSON, *supra* note 28, at 41 (noting that, in Massachusetts, an action for malicious prosecution could be brought not only against the person who charged another with a crime but also against the officer who made the arrest); see also Davies, *supra* note 2, at 633-34 n.230. However, this rule did not apply to "hue and cry" arrests. See *supra* note 222 (entry 6).

However, during the nineteenth century, these relatively strict warrantless arrest standards were substantially relaxed as a response to increasing public fears of crime, particularly property crime. The changes began in England when the central court judges became increasingly alarmed at riots and robberies in London. In response, the English judges relaxed warrantless arrest authority standards for peace officers in ways that conferred substantially greater warrantless arrest authority on peace officers than private persons and thus permitted the development of modern policing. Indeed, those changes corresponded to the creation of the London police force in 1829.

A comparable change occurred in early nineteenth century America. Although it appears that state courts may have tended to bolster the protections afforded persons accused of crime during the first decade or so after independence,⁵⁷⁶ there was a change of attitudes in later decades as the public became increasingly concerned with the threat of crime and disorder, especially with theft crimes.⁵⁷⁷ American courts responded by importing the relaxed English warrantless arrest standards under the sometimes-ambiguous rubric of “common law.”

English and American judges expanded the warrantless arrest authority conferred on peace officers in essentially two steps. The first effectively immunized peace officers (but not private persons) who assisted another person in making an arrest if the other person “charged” that a felony had been committed (even if that turned out not to be the case). The second step allowed police officers (but not private persons) to justify an arrest made on his own initiative by showing that he had “probable cause” to believe a felony had been committed, even if no crime, or only a misdemeanor, had actually been committed.⁵⁷⁸

⁵⁷⁶ See, e.g., NELSON, *supra* note 28, at 97-101.

⁵⁷⁷ See, e.g., *id.* at 117-21 (noting the sharp increase in theft prosecutions in Massachusetts between 1790 and 1830).

⁵⁷⁸ Much of the following discussion is based on Davies, *supra* note 2, at 620-42. After reconstructing the post-framing expansion of the peace officer's warrantless arrest authority from the historical sources, I discovered that Professor Jerome Hall had previously described that same development in English law in a rarely cited article. See Davies, *supra* note 2, at 628 n.214 (citing Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566 (1936)).

1. The Adoption of the "On Charge"
Warrantless Arrest Standard

The initial expansion of the peace officer's warrantless arrest authority occurred in the 1780 Court of King's Bench decision, *Samuel v. Payne*.⁵⁷⁹ In *Samuel*, Hall, a private person, suspected that Samuel had stolen some of his laces. Hall, therefore, procured a warrant to search for the stolen laces. The warrant authorized the arrest of Samuel only if the laces were found in his possession, but not otherwise. Payne, a constable, assisted in executing the search warrant. Although Hall and Payne found no stolen laces, Hall nevertheless asserted that Samuel was a thief, and Constable Payne assisted Hall in making a warrantless arrest of Samuel. After a magistrate released Samuel for lack of evidence of theft, Samuel sued both Hall and Payne for trespass.

Lord Mansfield, the chief justice of King's Bench, presided at the trespass trial and followed the traditional rule by instructing the jury that a constable could not justify a warrantless arrest based on an unsworn charge by another person. Thus, if the arrest was unlawful, a constable who assisted was just as liable for trespass damages as the person who initiated the arrest. On the basis of that instruction, the jury then found both Hall and Constable Payne liable for trespass damages.⁵⁸⁰

Constable Payne, however, moved for a new trial before the full Court of King's Bench. The full court, including Mansfield, then decided to recognize a "charge" of felony as a sufficient justification for a warrantless arrest by an officer, even if no felony was proven. The judges described the earlier rule as "inconvenient."⁵⁸¹ Nevertheless, they did not relax the rule that a private person could not justify making a warrantless arrest or assist-

⁵⁷⁹ 1 Dougl. 359, 99 Eng. Rep. 230 (K.B. 1780).

⁵⁸⁰ *Id.* at 359-60, 99 Eng. Rep. at 230-31.

⁵⁸¹ *Id.* at 359-60, 99 Eng. Rep. at 230-31. Five years later, Mansfield summed up the post-*Samuel* law of warrantless felony arrest as follows: "When a felony has been committed, any person may arrest on reasonable suspicion. When no felony has been committed, an officer may arrest on a charge." *Cooper v. Boot*, 4 Dougl. 339, 342, 99 Eng. Rep. 911, 913 (K.B. 1785).

ing unless a felony had actually been committed.⁵⁸² This novel distinction between the warrantless arrest authority of a peace officer and that of a private person was the seed from which the discretionary arrest authority of the modern police officer developed.⁵⁸³

Although *Samuel* was decided in 1780, it could not have influenced the framing of the American state search-and-seizure provisions because the case report was not published until 1782,⁵⁸⁴ and few English law books would have been imported during or immediately after the years of the Revolutionary War. Moreover, because the 1780 Massachusetts Declaration of Rights had previously prohibited “arrest[s]” except according to “the law of the land” and had already announced the “right to be secure” against “unreasonable searches and seizures” in the ban against general warrants, it is clear that *Samuel* could not have been part of the original understandings of either of those provisions. It is possible that some of the Federal Framers may have heard of *Samuel* by 1789, but, if so, they would have understood it to be a novel English ruling rendered after American independence (and thus not part of the common law absorbed by the American states).⁵⁸⁵

⁵⁸² Despite its novelty, *Samuel* preserved trespass accountability by confining the “on charge” justification to the officer, while still holding the person who made the unproven charge of felony accountable for damages for false arrest. *Samuel*, 1 Dougl. at 360, 99 Eng. Rep. at 231 (“He that makes the charge should alone be answerable”). On retrial, Constable Payne was found not liable, but Hall, the accuser, was again found liable for trespass. *Id.* at 360 n.8, 99 Eng. Rep. at 231 n.8.

⁵⁸³ Professor Hall also observed that “We are able to trace definitely in the cases the origin of the rule which augmented . . . [the officer’s warrantless arrest authority]. *Samuel v. Payne* is the pivot upon which the legal cycle turns.” Hall, *supra* note 578, at 570 (citation omitted).

⁵⁸⁴ See 1 MAXWELL, *supra* note 13, at 299 (entry 44) (1 Douglas published 1782).

⁵⁸⁵ The descriptions of *Samuel* that were available by 1789 explicitly portrayed the King’s Bench ruling as novel. For example, a note on *Samuel* in Thomas Leach’s 1787 edition of Hawkins’s widely used treatise made it clear that the ruling was novel. See 2 LEACH’S HAWKINS, *supra* note 217, at 120 n.(a) (describing *Samuel* as “the first determination of the point” that a constable could arrest “on charge” even in the absence of an actual felony). Likewise, descriptions of *Samuel* in justice of the peace manuals also demonstrated its novelty. For example, a discussion in a 1785 edition of Burn’s manual described both the initial imposition of liability on the constable at the trial presided over by Mansfield and the new rule adopted by the Court of King’s Bench. See 1 BURN (1785 ed.), *supra* note 159, at 102-03 (noting the different rules applied by Mansfield at trial and by the King’s Bench on motion for new trial). Descriptions of *Samuel* during the 1790s still noted the novelty of the ruling. In particular, the difference between the

In fact, American courts appear to have been slow to endorse *Samuel's* innovation. For example, the 1814 Pennsylvania decision in *Wakely v. Hart*, a leading American authority on the warrantless arrest authority of a constable, did not even hint of the "on charge" standard or of the idea that an officer might possess distinctive *ex officio* (as opposed to personal) warrantless felony arrest authority.⁵⁸⁶ Rather, the 1829 New York decision *Holley v. Mix*—decided four decades after the 1789 framing—appears to have been the earliest American case to adopt the "on charge" justification.⁵⁸⁷ However, during the remainder of the nineteenth century, it appears that American jurisdictions generally adopted the "on charge" justification for warrantless arrests by officers, and thus began to recognize that peace officers could possess broader warrantless arrest authority than private citizens.⁵⁸⁸

trial and appellate rulings was still recognized in a 1797 edition of Burn. See 1 BURN (1797 ed.), *supra* note 159, at 129-30. For a virtually identical description of the two proceedings in *Samuel*, see WILLIAM WALLER HENING, NEW VIRGINIA JUSTICE 36-37 (entered 1794, printed 1795). Although it was published well after the framing, the report of *Samuel* reprinted in the English Reports also described it as "the first determination of the point." See *Samuel*, 99 Eng. Rep. at 231 n.7.

⁵⁸⁶ 6 Binn. 315 (Pa. 1814); discussed in Davies, *supra* note 2, at 615-16. In particular, *Wakely* still analyzed the arrest authority of a high constable of Philadelphia in terms of the inherent arrest authority possessed by any person rather than in terms of *ex officio* arrest authority. See Davies, *supra* note 2, at 629 n.218. Additionally, *Wakely* still emphasized the traditional requirement of a felony-in-fact for a warrantless arrest. See *id.* at 633 n.227. There may have been a specific reason why *Wakely* did not discuss *Samuel*—an 1810 Pennsylvania statute prohibited citation of English decisions rendered after July 4, 1776. See HOWARD, *supra* note 103, at 259-60.

⁵⁸⁷ 3 Wend. 350, 353 (N.Y. 1829) (citing *Samuel*). The slowness of the American adoption of *Samuel* is also evident in the fact that Nathaniel Dane still described it as an innovative case in 1824: "[i]f this case be law, it settles the long agitated point, and proves a peace officer may arrest on a reasonable suspicion of felony without a warrant, though no felony has been committed." 3 NATHAN DANE, DIGEST OF AMERICAN LAW 72 [ch. 75, art. 6, § 4] (volume published 1824).

⁵⁸⁸ See, for example, the inclusion of the "on charge" justification in the 1887 South Dakota arrest statute quoted in *Elk v. United States*, 177 U.S. 529, 535 n.1 (1900) (providing that an officer could make a warrantless arrest "(4) On a charge made [by another person] upon reasonable cause of the commission of a felony by the party arrested"); quoted in Davies, *supra* note 2, at 628).

2. The Adoption of the Bare "Probable Cause" Warrantless Arrest Justification

The second and more far-reaching English import was the elimination of the felony-in-fact requirement through the recognition of "probable cause" alone as a justification for a peace officer's warrantless felony arrest. In the 1827 ruling in *Beckwith v. Philby*, English judges used *Samuel* as a springboard for that further expansion of the *ex officio* arrest authority of a peace officer. *Beckwith* permitted an officer (but not a private person) to justify a warrantless arrest if he could show he had had "reasonable ground to suspect . . . [that a] felony [had] been committed," even if none had been⁵⁸⁹—that is, on probable cause alone.⁵⁹⁰

Moreover, because it appears that this bare probable cause standard was understood to allow the officer to form probable cause from *unsworn* information provided by other persons, this reduced standard effectively freed peace officers from the old rule that warrantless arrests could be made only by persons who had personal knowledge of the crime. Instead, the "probable cause" standard permitted officers to arrest on the basis of hearsay information provided by informants, even though such unsworn statements would not have been admissible as evi-

⁵⁸⁹ 6 B. & C. 635, 638-39, 108 Eng. Rep. 585, 586 (1827). Philby, a high constable, was told that Beckwith was acting suspiciously and suspected, from various circumstances, that Beckwith had stolen a horse. Philby arrested Beckwith on that basis. However, no horse had been stolen. Beckwith, therefore, sued for trespass (false arrest) under the traditional rule that a felony arrest could not be justified if there had not been an actual felony. However, Lord Tenterden, C.J., ruled that an officer could arrest upon reasonable ground to suspect a felony. A similar ruling was announced in *Davis v. Russell*, 5 Bing. 354, 130 Eng. Rep. 1098 (C.C. 1829). The timing of the *Beckwith* decision is notable because it came just two years prior to the creation of the London Metropolitan Police in 1829. The expansion of a peace officer's discretionary arrest authority in *Beckwith* may well have been a crucial step in making a police force feasible.

⁵⁹⁰ *Samuel* destabilized the law regarding warrantless arrests by officers, and a number of English decisions issued after *Samuel* contained language that anticipated the even broader reasonable (or probable) ground to suspect commission of a felony standard announced in *Beckwith*. See Hall, *supra* note 578, at 571-75. Nevertheless, *Beckwith* appears to be the first case that actually upheld the lawfulness of an officer's warrantless arrest in circumstances in which no felony had been committed. See *id.* at 575 (assessing that *Beckwith* was the first case "closely representing the ultimate doctrine" that an officer can arrest on reasonable (that is, probable) grounds to suspect a felony has been committed).

dence in a criminal trial, or even to support an application for an arrest warrant.⁵⁹¹

Adoption of the bare probable cause justification for warrantless felony arrests was a more radical enlargement of the officer's arrest authority than the "on charge" justification had been. By replacing the felony "in fact" requirement with only a probable felony standard, while at the same time not requiring that anyone make (and be accountable for) an explicit charge that a felony had been committed, *Beckwith* provided the officer with a substantial degree of discretion to judge the appropriateness of a warrantless felony arrest. As a result, an officer enjoyed much broader latitude for erroneously arresting persons who were innocent of any crime or for erroneously making warrantless arrests of persons who were actually guilty only of misdemeanors.⁵⁹² In effect, *Beckwith's* adoption of the probable cause standard for warrantless felony arrests opened the way for peace officers to begin to investigate for possible crimes.

American lawyers and judges probably became familiar with the English *Beckwith* probable cause standard by the early 1830s. Even so, it appears that the first American reported decisions to endorse the bare probable cause standard for warrantless arrests by officers were the 1844 Pennsylvania decision *Russell v. Shuster*⁵⁹³ and the 1850 Massachusetts decision *Ro-*

⁵⁹¹ I have not yet been able to track this change specifically in the cases, but I have determined that, except for the dying declaration of a murder victim, hearsay exceptions regarding admission of evidence in criminal trials were not created until the early to mid nineteenth century. See Davies, *Hearsay*, *supra* note 3, at 418-22, 456-62.

⁵⁹² A large majority of the "felony arrests" made in American jurisdictions today are disposed of without any felony complaint being filed. See, e.g., Thomas Y. Davies, *A Hard Look at What We Know (And Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. [now LAW & SOC. INQUIRY] 643 n.172. As discussed above, warrantless arrests for misdemeanors were subject to more restrictions than those for felonies. See *supra* note 167 and accompanying text; see also *infra* note 659 and accompanying text.

⁵⁹³ 8 Watts & Serg. 308, 309 (Pa. 1844). Defendants Russell and Downer (apparently constables, though the report does not say) arrested Shuster on the ground that Shuster's trunk, which he permitted the constables to examine, contained burglar's tools, and thus showed that he "was addicted to burglary." *Id.* at 308. When no charges were brought, Shuster sued for trespass. At trial, the defendants were not permitted to admit evidence regarding Shuster's trunk, and the verdict was for Shuster. The Supreme Court reversed and ruled that the evidence regarding the trunk should have been admitted because the issue was "probable cause." *Id.* at 310. Chief Justice Gibson recited that "[a] constable may justify an arrest for reasonable cause of suspicion alone; and in

han v. Sawin.⁵⁹⁴ Although neither of these rulings acknowledged the novelty of the probable cause standard, that standard sometimes sparked some controversy and was adopted unevenly by other American jurisdictions.⁵⁹⁵ Nevertheless, it appears that a majority of American state courts adopted the probable-cause-to-suspect-felony standard as a defense to trespass suits for unlawful warrantless arrests during the remainder of the nineteenth century—sometimes even though the state statute codifying arrest standards had not been amended and still stated the felony-in-fact requirement for a warrantless arrest by an officer.⁵⁹⁶

this respect he stands on more favourable ground than a private person, who must show, in addition to such cause, that a felony was actually committed.” *Id.* at 309. Justice Gibson cited no authorities. However, counsel for the defendant officers cited *Wakely*, 6 Binn. 316 (Pa. 1814); *Samuel*, 1 Dougl. 359, 99 Eng. Rep. 230 (K.B. 1780); and *Beckwith*, 6 B. & C. 635, 108 Eng. Rep. 585 (1827). *Id.* Nothing in the opinion acknowledged the departure from the explicit felony-in-fact requirement that had been set out in the Pennsylvania court’s earlier ruling in *Wakely* (discussed *supra* note 586).

⁵⁹⁴ 59 Mass. (5 Cush.) 281, 284 (1850) (reciting that “[p]eace-officers without a warrant may arrest suspected felons,” citing *Samuel* and *Beckwith*, and incorrectly asserting that the 1814 Pennsylvania ruling in *Wakely* “is to the same effect”).

⁵⁹⁵ For example, a North Carolina judge dissented from an 1856 decision adopting *Samuel* and *Beckwith* because those cases “go very far in the justification of officers, who apprehend suspected persons without warrants . . . farther than is compatible with that personal liberty, of which English jurists are so fond of boasting.” *Brockway v. Crawford*, 48 N.C. (3 Jones) 433, 439-40 (1856) (Battle, J., dissenting).

The less-than-uniform adoption of the probable cause standard is also evident in legislative arrest standards. For example, New York decisions interpreted the state warrantless arrest statute to reject probable cause of felony as a justification for a warrantless arrest by an officer as late as 1939. *See, e.g., Morgan v. N.Y. Cent. R. Co.*, 9 N.Y.S. 2d 339, 341 (N.Y. App. Div. 1939) (interpreting state statute to permit warrantless felony arrest by officer only when a felony had in fact been committed). *See also* N.Y. CRIM. PRO. LAW § 177 (quoted in *United States v. Di Re*, 332 U.S. 581, 589 n.7 (1948)). Likewise, Congress still employed the felony-in-fact standard, not the probable cause of felony standard, when it initially addressed the warrantless arrest authority of federal marshals in 1935. *See* 49 Stat. 377, 378 (1935) (providing that federal marshals could “make arrest without warrant” for federal offenses “committed in their presence” or “in cases where such a felony has in fact been or is being committed and they have reasonable grounds to believe that the person to be arrested has committed or is committing it”).

⁵⁹⁶ In some instances, state legislatures endorsed the reasonable cause standard for warrantless felony arrests by officers by adding a reasonable cause or probable cause justification to the state statute that codified common-law warrantless arrest standards. *See, e.g.,* the 1887 South Dakota arrest statute quoted in *Elk v. United States*, 177 U.S. 529, 535-36 n.1 (1900) (including a “reasonable cause” justification for a felony arrest by an officer) (quoted and discussed in Davies, *supra* note 2, at 628). In other instances, however, state courts adopted a probable cause standard as a defense to an officer’s

Thus, by the early twentieth century, the probable cause standard had effectively become the predominant standard for warrantless felony arrests by officers in the American states—and court opinions and commentators began to describe probable cause, by itself, as though that had *always* been the common-law standard.⁵⁹⁷ Notably, this relaxation of warrantless arrest standards was not the result of legislation, as the Framers had feared, but was instead accomplished by judges, whom the Framers had not expected to engage in law making.

3. The Transformation to Investigatory Criminal Procedure

By allowing a police officer to rely on unsworn information provided to him by other persons, even when no one else actually made a felony “charge,” the probable cause justification undercut the adverse consequences that had previously inhibited peace officers from making warrantless arrests. The protection of personal liberty earlier afforded by common-law accusatory procedure had consisted largely of the requirement that a warrantless arrest be initiated only by a named complainant who could be held personally accountable if he could not establish that a felony had actually been committed and that he had substantial grounds for suspecting the arrestee. However, under the new probable cause standard, no particular person was clearly responsible for the validity of the arrest. The officer was not accountable for actually “charging” the commission of a felony, because he could act on the basis of information provided by others. Likewise, the informant who provided the information on which the officer acted was not responsible because he had not actually initiated the arrest. There no longer need have been a complainant in the full sense of the term. Thus, the

trespass liability even though the state arrest statute had not been amended to include it. See, e.g., *State v. Hum Quock*, 300 P. 220, 221 (Mont. 1931) (upholding an arrest by a prosecutor’s special investigator based on probable cause, even though the state arrest statute provided officers only with equal authority as private persons and still required observation of the offense, actual guilt of a felony, or reasonable cause “when a felony has in fact been committed”).

⁵⁹⁷ See Davies, *supra* note 2, at 639-40 n.252 (tracing the appearance and development in opinions and commentaries of the myth that probable cause, alone, was the historical common-law warrantless arrest standard).

probable cause standard blurred accountability for a mistaken arrest, and that change appears to have severely undercut the viability of the trespass remedy as a means of enforcing warrantless arrest standards. In addition, because an innocent person could not readily appraise whether an officer who attempted an arrest was justified by “probable cause,” the common-law right to forcibly resist an unlawful arrest also became unworkable and gradually collapsed.⁵⁹⁸ Hence, during the period in which American cities were replacing constables with new police departments, it appears that adoption of the bare probable cause standard had the practical effect of conferring discretionary arrest power on the new police officers.

This expansion of the warrantless arrest authority of local peace officers, which also indirectly expanded the authority of federal officers,⁵⁹⁹ constituted a virtual revolution in criminal justice authority. One direct result was that warrantless felony arrests displaced the previous reliance on arrest warrants, and justices of the peace ceased to play a significant role in supervising arrests. Although historical data is virtually nonexistent, it seems likely that police in some jurisdictions virtually stopped obtaining warrants.⁶⁰⁰

⁵⁹⁸ The common-law right to resist an unlawful arrest or search was fairly robust (though not without ambiguity) at the time of the framing. See Davies, *supra* note 2, at 625 n.204. However, that right was undercut when the officer was given greater leeway for error; a person who was the target of an attempted arrest could usually apprise whether he was guilty of a crime, but he could not readily assess whether the officer had information that made it reasonable to suspect he might be guilty of a crime. Thus, the shift to probable cause made it riskier to resist arrest. Moreover, the appearance of police departments and the presence of multiple officers and eventually of armed officers also made resistance less feasible. It is difficult to pinpoint exactly when the right to resist unlawful arrest collapsed—but it clearly did.

⁵⁹⁹ The federal marshal statute in effect during the nineteenth century linked the authority of federal officers to that of a state sheriff in the state in which the federal marshal served. See *supra* note 491. As a result, the changes in state warrantless arrest law were probably understood to automatically expand the warrantless arrest authority of many federal officers without any federal legislation or federal court decisions. See Davies, *supra* note 2, at 611-12 n.171.

⁶⁰⁰ It is unlikely that historical data regarding the use of arrest or search warrants could be compiled because warrants were not typically docketed the way court cases were. See, e.g., Richard Van Duizend, L. Paul Sutton, & Charlotte A. Carter, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 2* (National Center for State Courts, 1984) (noting that in several cities studied modern search warrants were usually kept “in envelopes or boxes kept separately from other court records” although a few cities now have search warrant logs).

The expansion of *ex officio* felony arrest authority also expanded the opportunities for officers to make *warrantless searches* incident to arrest. Indeed, police may have begun to search houses in which warrantless arrests had been made. Thus the relaxed standards for warrantless arrests and the resulting disuse of warrants made the power to search incident to arrest more significant than it had been during the framing era.⁶⁰¹

Moreover, because the probable cause standard for warrantless arrests permitted officers to investigate potential crime and potential suspects, that standard also appears to have created a new opportunity for police interrogation of suspects and, thus, to have been the doctrinal catalyst for the emergence of modern police interrogation practices. In contrast to the framing-era requirement that a complainant be prepared to prove an arrestee's guilt *before* an arrest was made, the probable cause standard allowed police to build the case against the defendant by interrogating him *after* the arrest.⁶⁰²

In addition, the allowance of use of hearsay information to establish probable cause for a warrantless arrest also seems to have eventually undermined the common-law requirement that arrest and search warrants be based on the sworn testimony of persons with direct personal knowledge of the facts of the crime. As a result, the constitutional requirement that warrants be

One fact that is well documented is that search warrants were very infrequently used in American jurisdictions in the decades prior to the 1961 ruling in *Mapp v. Ohio*, but use of search warrants increased substantially after that ruling. See, e.g., *id.* at x-xi; STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES 163-64 (1970). Although those statistics deal primarily with search warrants, it seems likely that arrest warrants would have followed the same pattern.

⁶⁰¹ Reported decisions regarding the allowable scope of searches incident to arrest first became evident during the late nineteenth century. For example, Professor Taylor reported that he found only three cases raising issues as to the lawfulness of searches incident to arrest "prior to 1920" and cited state cases from 1866, 1887, and 1897. TAYLOR, *supra* note 46, at 188 n.77. Taylor interpreted that fact to mean that courts were beginning to question the authority for warrantless searches made incident to arrest at that time. See *id.* at 45. It seems more likely that the issue appeared in reported cases at that time because officers were increasingly testing the limits of their expanded authority to make warrantless arrests and warrantless searches incident to them. Warrantless searches of houses based on a search incident to arrest rationale were sometimes made. See, e.g., *Harris v. United States*, 331 U.S. 145 (1947) (upholding search of four-room apartment as a search incident to arrest).

⁶⁰² See Davies, *Fifth Amendment*, *supra* note 19, at 1030-34.

issued only upon "oath" was degraded to merely require an officer's attestation to having received unsworn hearsay information from someone else.⁶⁰³

In sum, although *trial* protections afforded criminal defendants may have been strengthened in some ways during the nineteenth century,⁶⁰⁴ legal constraints on government search-

⁶⁰³ The Supreme Court still expressed skepticism regarding the use of hearsay information to establish probable cause for a search warrant as late as *Grau v. United States*, 287 U.S. 124, 128 (1932) ("A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury."). However, the restrictive use of hearsay to establish probable cause for warrants was in tension with the permissive allowance of the use of hearsay information to provide probable cause for warrantless arrests, as permitted in *Beckwith* and its progeny. The Supreme Court resolved the tension by rejecting the general proposition that probable cause for a *warrantless arrest* must be based on evidence that would be admissible at trial. *Draper v. United States*, 358 U.S. 307, 311-12 n.4 (1959) (disapproving the standard stated in *Grau* and asserting that allowance of hearsay evidence to establish probable cause is consistent with the treatment of probable cause in *Brinegar v. United States*, 338 U.S. 160, 172-74 (1949)).

In 1960 the Justices also ruled that an affidavit for a *search warrant* is not to be deemed invalid because "it sets out not the affiant's observations but those of another" because it would be "incongruous" to apply different standards for probable cause for warrantless arrests and search warrants. *Jones v. United States*, 362 U.S. 257, 269-70. The Supreme Court's allowance of hearsay to show probable cause was anticipated in earlier lower federal and state court rulings. However, the earlier cases that permitted probable cause for an arrest or search to be based on hearsay information from an informant tended to require that the informant be identified, notwithstanding the general "informant's privilege" recognized in the law of evidence. See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 769 n.9 (John T. McNaughton rev., 1961) (citing cases). The Supreme Court, however, also effectively rejected a rule of disclosure of the identity of an informant who provided the information constituting probable cause for an arrest or search warrant in 1960 in *Jones*, 362 U.S. at 272 (although defendant objected that the warrant affidavit did not name informants, the Court ruled that informants need not be produced before the commissioner authorized to issue search warrant).

The Court subsequently rejected a claim that a defendant was entitled to know, for purposes of challenging the validity of an arrest and search, the identity of the person who allegedly provided the information that constituted probable cause. See *McCray v. Illinois*, 386 U.S. 300 (1967). Although *McCray* involved a warrantless arrest, it has been understood—in light of the Court's earlier statement in *Jones* that it would be "incongruous" if the standard for probable cause for a warrant were higher than for a warrantless intrusion—to also mean that the identity of an informant need not be disclosed in a warrant application based on hearsay information, or in subsequent suppression proceedings.

⁶⁰⁴ There is no doubt that, during the nineteenth century, criminal trial procedure and the law of evidence became more complex and generally offered more protections to defendants than had been the case earlier. See, e.g., Davies, *Arrest*, *supra* note 3, at 420-21. However, it is presently unclear whether the relaxation of arrest standards was related to the change in the criminal trial—for example, whether state judges were

and-seizure power were severely reduced. The recognition of bare probable cause as a justification for a warrantless arrest by an officer marked a drastic departure from the common-law regime of accusatory criminal procedure that was familiar to the Framers. Before that change, arrest authority arose only when a named complaint made an accusation of crime-in-fact; after that change, government officers acquired authority to investigate whether there had been a crime, and to arrest and search on a probability of a crime, even if there had been no actual crime. The enlarged *ex officio* authority of the officer, coupled with the organizational might of the new police departments, fundamentally changed arrest and search doctrine and practice by conferring a substantial degree of *discretionary* authority on the ordinary peace officer. Thus, investigatory procedure displaced accusatory procedure, and the modern police officer and aggressive policing had become realities by the end of the nineteenth century.⁶⁰⁵ As a result, the warrant ceased to be the usual mode of arrest, and possibly even the usual mode of search, and the “ministerial” label disappeared from the literature on law enforcement officers.⁶⁰⁶

Moreover, during the nineteenth century neither the state nor federal courts identified any constitutional standard for warrantless arrests or attempted to reimpose any constitutional limitations on the warrantless arrest authority of the new police officer.⁶⁰⁷ Thus, by the beginning of the twentieth century, the police officer's badge had virtually become the functional equivalent of a framing-era general warrant.

inclined to relax arrest standards because they perceived that trial procedure offered more protections against wrongful convictions—or whether the two developments merely coincided with each other.

⁶⁰⁵ For a discussion summarizing the differences between accusatory and investigatory procedure, see Davies, *Arrest*, *supra* note 3, at 419-33.

⁶⁰⁶ Prior to the mid-nineteenth century, peace officers and even sheriffs were typically described as “ministerial officers,” meaning that they simply executed the commands of justices of the peace and courts, but did not exercise their own judgment or discretion. However, that label disappeared by the late nineteenth century. See Davies, *supra* note 2, at 626 n. 208, 639.

⁶⁰⁷ See, e.g., *Bad Elk v. United States*, 177 U.S. 529 (1900) (discussing legality of a warrantless felony arrest without mentioning any constitutional standard).

*C. The Supreme Court's Reinvention of
Search-and-Seizure Doctrine*

Partly because federal law did not recognize any writ of error from a federal criminal conviction until the late nineteenth century, the Supreme Court had few occasions to address criminal procedure during the early nineteenth century.⁶⁰⁸ In addition, under the doctrine of *Baron v. Baltimore*, the federal courts did not apply the provisions of the Federal Bill of Rights to state proceedings.⁶⁰⁹

In 1868, however, the Fourteenth Amendment created an additional “due process of law” guarantee that was applicable to the states. Section 1 of the Fourteenth Amendment represented a revolution in American constitutional law insofar as it imposed broad national limits on state governments. In relevant part, it reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁶¹⁰

Of course, the language of the Due Process Clause in this Amendment tracks that in the “due process of law” clause of the Fifth Amendment.⁶¹¹

The legislative history of the Fourteenth Amendment sheds little light on how the term “due process of law” was understood in 1868, because the Amendment was presented and debated largely in terms of the “privileges and immunities” of citizens. On a subsequent occasion, one of the proponents of the Fourteenth Amendment associated the term “due process of law” in that Amendment with Magna Carta and defined it to require

⁶⁰⁸ See ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 312-14 (2d ed., 2002).

⁶⁰⁹ *Baron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). However, state courts sometimes treated the Federal Bill of Rights as being applicable to state proceedings. See Jason Mazzone, *The Bill of Rights in the Early State Courts*, MINN. L. REV. (forthcoming 2007).

⁶¹⁰ U.S. CONST. amend. XIV, §1.

⁶¹¹ Compare text accompanying note 610 (setting out U.S. CONST. amend. XIV) with *supra* text preceding note 458 (setting out U.S. CONST. amend. V).

“an impartial trial according to the laws of the land.”⁶¹² However, it is unclear if that understanding of the Fourteenth Amendment’s Due Process Clause was widely shared—or whether any particular interpretation was widely shared. What is clear is that the Justices of the Supreme Court soon imposed their own interpretation on the Due Process Clause—and it did not include the common law requisites for pretrial criminal procedure.

⁶¹² See, e.g., *Adamson v. California*, 332 U.S. 46, 111 (1946) (appendix on the legislative history of the Fourteenth Amendment attached to Justice Black’s dissenting opinion) (quoting an 1871 statement by Representative Garfield regarding the meaning of the Due Process Clause of the Fourteenth Amendment).

Although there is some evidence that the Congressional Framers of the Fourteenth Amendment intended for that Amendment to make the first eight amendments to the Constitution binding on the States, the discussions of that point were usually phrased in the terms of the “privileges and immunities” of citizens. See, e.g., *id.* at 105-06 (quoting statement of Senator Howard); *id.* at 115 (quoting statement of Representative Bingham). Although Justice Black argued in *Adamson* that the Due Process Clause of the Fourteenth Amendment should be construed to incorporate and make binding on the states the first eight amendments to the Constitution, he did not identify any statement in the legislative history that actually phrased the incorporation of the Bill of Rights in terms of “due process of law.” Rather, he asserted in his dissenting opinion that the legislative history indicated “that one of the chief objects that the provisions of the Amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.” *Id.* at 71-72 (emphasis added).

Other commentaries on the legislative history of the Fourteenth Amendment also indicate that the incorporation of the Bill of Rights was usually presented in terms of “privileges and immunities.” See generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); IRVING BRANDT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 318-43 (1965). Mott has also noted that:

The lack of any intelligent discussion of the due process provision in the Fourteenth Amendment is most noteworthy. It was the least discussed of any of the provisions in the [Fourteenth A]mendment. Practically no attention was paid to its meaning, although the other clauses in the same section were carefully scrutinized. Bingham seems to have been the only member of Congress who had occasion to tell what he considered due process of law to mean, and he very probably expressed the general feeling of the House when he declared in answer to a question regarding its meaning, “the courts have settled [the meaning of due process of law] long ago, and the gentlemen can go and read their decisions.”

MOTT, *supra* note 91, at 164.

1. The Supreme Court's Construction of Fourteenth Amendment "Due Process"

It is evident that, during the late nineteenth century, the majority of the Justices of the Supreme Court wanted nothing to do with reviewing state criminal proceedings under the Due Process Clause of the Fourteenth Amendment. It is also evident that at least a number of the same Justices did want to impose federal constitutional restrictions on state regulation of business enterprises. The net result was that the Justices interpreted "due process of law" in the Due Process Clause of the Fourteenth Amendment quite differently from what the Framers of the Fifth Amendment might have anticipated that term would mean.

a. Stripping away criminal procedure. In 1884, in *Hurtado v. California*,⁶¹³ the Justices heard a challenge to California's practice of commencing felony prosecutions with an information brought by a prosecutor's office rather than by an indictment handed down by a grand jury. Specifically, *Hurtado*, who had been sentenced to death for murder, argued that his conviction was a violation of the Fourteenth Amendment because he had been prosecuted only by an information rather than by the grand jury indictment which was a requisite of "due process of law."⁶¹⁴ The Justices rejected that challenge seven to one.⁶¹⁵ Writing for the majority, Justice Matthews asserted that grand jury indictment had not always been a requirement of a criminal prosecution in English law.⁶¹⁶ Additionally, he asserted that the inclusion of the Grand Jury Indictment Clause at the outset of the Fifth Amendment demonstrated that the 1789 Framers could not have understood that an indictment was required by "due process of law"—otherwise, the Grand Jury Indictment

⁶¹³ 110 U.S. 516 (1884).

⁶¹⁴ *Id.* at 519.

⁶¹⁵ *Id.* at 538.

⁶¹⁶ *Id.* at 524-26. Justice Matthews's argument on this point was composed largely of a specious conflation of the settled requirements for misdemeanor and felony prosecutions; common law, however, had not required indictment as a requisite of misdemeanor prosecutions, but had required indictments as a requisite for felony trials. Justice Matthews merely rebutted the strawman argument that all criminal prosecutions required indictment.

Clause would have been a redundancy.⁶¹⁷ However, Justice Matthews's former claim consisted of misdirection and highly edited quotations,⁶¹⁸ and his latter redundancy claim ignored the actual legislative history of the Fifth Amendment.⁶¹⁹

As Justice Harlan correctly pointed out in his lone dissent in *Hurtado*, the Framers must have understood "due process of law" to refer to "those settled usages and modes of proceeding existing in the common and statute law of England [which had been adopted and treated as law in the American colonies],"⁶²⁰ and it was a settled common-law rule, at the time of the adoption of the Bill of Rights, that "no person could be arraigned for a capital offence except upon the presentment or indictment of a grand jury."⁶²¹ Justice Harlan articulated the authentic history, but the majority rewrote the history to fit the desired result.

⁶¹⁷ *Id.* at 534-35. Actually, Madison himself expressed the view that redundant provisions in amendments to the Constitution were harmless. See *supra* note 446.

⁶¹⁸ Justice Matthews generally asserted that "due process of law" did not require any particular procedures and specifically argued there could not be any fixed requirement of a grand jury indictment because misdemeanors could be prosecuted by information—ignoring the fact that the case at hand was a murder conviction for which the death penalty had been imposed. For example, Justice Matthews concluded his analysis by quoting a passage from Blackstone which asserted the validity of prosecutions by informations "as to those offenses in which informations were allowed as well as indictments . . ." *Id.* at 538 (quoting 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 305). However, Justice Matthews omitted to note that Blackstone, in that discussion, clearly stated that informations were permissible *only* for misdemeanors, including "gross misdemeanors." Indeed, Justice Matthews evaded what Blackstone had written *immediately* before the passage that Justice Matthews did quote:

But these informations (of every kind) are *confined by the constitutional law to mere misdemeanors only*: for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men [that is, an indictment], before the party shall be put to answer it [that is, be made to stand trial].

4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 305 (emphasis and bracketed language added). Moreover, Blackstone had used the term "due process of law" in stating "that no man shall be put to death without being brought to answer by due process of law." 4 BLACKSTONE (1st ed. 1769), *supra* note 135, at 313 (quoted *supra* text accompanying note 248). Blackstone plainly did not endorse the legality of a capital prosecution based on an information, and did not in any way suggest that a capital prosecution initiated by information could satisfy "due process of law."

⁶¹⁹ See *supra* note 488.

⁶²⁰ 110 U.S. at 542 (quoting *Den ex. Dem Murray v. Hoboken Land & Improvement Co. (Murray's Lessee v. Hoboken, etc., Co.)*, 59 U.S. (18 How.) 272, 276-77 (1855)). *Murray* is discussed *supra* note 22 and accompanying text.

⁶²¹ *Id.* at 544. See also *id.* at 544-45 (citing statements by Blackstone, Hawkins, and Hale regarding the requirement of indictment in capital cases).

The important effect, for present purposes, is that the Supreme Court's construction of the Due Process Clause of the Fourteenth Amendment further obscured the original criminal procedure connotations of the "due process of law" clause of the Fifth Amendment. Thus, by the end of the nineteenth century, neither of the two Due Process clauses retained any significant criminal procedure content.⁶²²

b. Due Process as a protection of property rights. The Justices were not content to simply strip away the earlier criminal procedure content of "due process of law." They also had other uses for the term. During the latter part of the nineteenth century, a number of Justices on the Supreme Court seem to have been determined to use the Federal Constitution to impose limitations on state regulation of business enterprises. Although the Privileges and Immunities Clause of the Fourteenth Amendment might have provided a platform for developing a doctrine of economic liberty, a closely divided Court had read that Clause almost out of existence in 1873 in the *Slaughterhouse Cases*.⁶²³ Perhaps for that reason, the Justices instead used the Due Process Clause of the Fourteenth Amendment as the principal platform for that program,⁶²⁴ and treated the Due Process Clause of the Fourteenth Amendment as a broad license for judicial assessment of the "reasonableness" of government regulations of property or business.⁶²⁵ Of course, this treatment

⁶²² In rulings after *Hurtado*, the Justices continued to strip away the criminal procedure content of "due process of law." In *Maxwell v. Dow*, 176 U.S. 581, 602-05 (1900), the Justices ruled that a noncapital criminal trial by a twelve-person jury was not sufficiently fundamental to be required by the Due Process Clause of the Fourteenth Amendment. The Justices also reached the same conclusion regarding the right against compelled self-accusation in *Twining v. New Jersey*, 211 U.S. 78, 99-100 (1908). The Justices finally did conclude that there had been a violation of due process in a sham trial in which the death penalty was imposed in *Powell v. Alabama (Scottsboro Case)*, 287 U.S. 45 (1932), but then subsequently concluded that the right against double jeopardy was not sufficiently fundamental to be required by due process in *Palko v. Connecticut*, 302 U.S. 319, 324-28 (1937).

⁶²³ *Butcher's Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing and Slaughter-House Co. (Slaughterhouse Cases)*, 83 U.S. (16 Wall.) 36 (1873).

⁶²⁴ In fact, Justice Bradley's dissenting opinion in the *Slaughterhouse Cases* invoked the Due Process Clause of the Fourteenth Amendment as well as the Privileges and Immunities Clause. See 83 U.S. at 114-15 (Bradley, J., dissenting).

⁶²⁵ See *supra* note 92. Mott, writing in the sycophantic style of academic commentary in the early twentieth century, then announced that this was the true meaning of "due process" because that term had carried broad and diffuse meaning since Magna

comported to a significant degree with the state courts' earlier broad interpretation of regulations as "deprivations" or forfeitures of property.

Hence, when the Justices of the Supreme Court subsequently concluded that it was necessary to address and limit the new discretionary authority of the new law enforcement officer, they had already eviscerated the criminal procedure content of the Due Process Clause of the Fourteenth Amendment and given that provision a different meaning. Instead, the Justices turned to the Fourth Amendment and expanded its original content to reach warrantless searches and, ultimately, warrantless arrests.

*D. The Supreme Court's Reinvention and Expansion of
Fourth Amendment Doctrine*

The Supreme Court developed modern Fourth Amendment doctrine in the course of making search-and-seizure rulings during the early decades of the twentieth century. However, I think that the basic tenets of modern search-and-seizure doctrine can be traced to three cases.

1. *Boyd v. United States* (1886)

The foundation for the modern construction of the Fourth Amendment was laid in 1886 in Justice Bradley's majority opinion in *Boyd v. United States*.⁶²⁶ The issue in *Boyd* was the constitutionality of a federal statute which provided that a federal court, in a customs enforcement proceeding, could issue an order commanding an importer to produce an invoice for the imported goods at issue.⁶²⁷ Although this order has often been referred to as a "subpoena," that is not quite accurate, because the statute actually required government prosecutors to make a particularized showing of cause for the particular records sought. Thus,

Carta. Thus, the Cokean criminal procedure content of "due process of law" —including the law of arrest—was effectively obliterated. Other commentators took differing views of due process. See Mott's complaints about the "failure" of the other commentators. MOTT, *supra* note 91, at 189-91.

⁶²⁶ 116 U.S. 616 (1886).

⁶²⁷ *Id.* at 622.

the requisites for the issuance of the court order to produce invoices were essentially the same as the requisites for issuance of a search warrant.⁶²⁸

The majority of the Justices ruled that the statute was “unconstitutional and void” and that the government’s inspection of the invoice produced under the statute and the admission of the invoice into evidence “were erroneous and unconstitutional proceedings.”⁶²⁹ However, Justice Bradley’s majority opinion did not claim that the order was the equivalent of an unparticularized general warrant, which it plainly was not. Instead, Justice Bradley made the novel claims that the court order to produce amounted to a search for papers and that a search for papers also amounted to compelled self-accusation; thus he asserted that the court order constituted an “unreasonable” seizure of papers in violation of the Fourth Amendment as well as a violation of the Fifth Amendment.⁶³⁰ Notably, by that date the Jus-

⁶²⁸ See Davies, *supra* note 2, at 728 n.514. The 1874 statute at issue had replaced a Civil War-era statute that had authorized search warrants for such invoices, and the court order provided for in the 1874 statute required a specific allegation that virtually amounted to the probable cause and particularity required for a warrant.

⁶²⁹ *Boyd*, 116 U.S. at 638.

⁶³⁰ *Id.* at 622, 630-33. Justice Bradley’s analysis in *Boyd* appears to have been inspired by an assertion that Thomas Cooley had made in his 1868 constitutional commentary to the effect that both the Fourth Amendment and the “spirit” of the Fifth Amendment’s prohibition against self-incrimination precluded government searches of papers. Specifically, Cooley asserted that, “except in a few special cases” a search warrant could not authorize an invasion of a person’s privacy “for the [sole] purpose of obtaining evidence against him.” COOLEY, *supra* note 565, at 305-06. Cooley also asserted, in an accompanying footnote, that the Fourth Amendment would ban such a search:

The fourth amendment to the Constitution of the United States, found also in many State constitutions, is very specific in its protection. . . . [U]nder this amendment, the seizure of one’s papers, in order to obtain evidence against him, is clearly forbidden; and the spirit of the fifth amendment, that no person shall be compelled, in a criminal case, to be a witness against himself, would also forbid such seizure.

Id. at 305-06 n.5. Cooley also asserted that “it would generally be safe . . . to regard all those searches and seizures ‘unreasonable’ which have hitherto been unknown to the law” including “a search-warrant for libels.” *Id.* at 307; see also *id.* at 307 n.1.

Cooley appears to have derived his claim about the Fourth Amendment banning searches of papers from Lord Camden’s statements in the published case reports of the English Wilkesite cases, especially in the version of *Entick v. Carrington* published in the State Trials case reports. See *id.* 300-03 (citing “Entinick [sic] v. Carrington, 2 Wils. 275 and 19 [How.] State Trials, 1030”). Cooley noted that Camden had declared in *Entick* that the common law did not authorize search warrants for papers and had condemned search warrants for papers as a “dangerous and unconstitutional practice.” *Id.*

tices had already begun to use “reasonableness” as the standard for assessing government regulation of business enterprises under the Fourteenth Amendment Due Process Clause.⁶³¹

To justify the ruling in *Boyd*, Justice Bradley relied primarily upon statements that Lord Camden had made in 1765 in one of the later English Wilkesite cases, *Entick v. Carrington*.⁶³² In particular Justice Bradley relied upon passages in which Lord Camden had stated that a search warrant for papers was not recognized in English law and that a search of papers was tantamount to compelled self-accusation.⁶³³ Justice Bradley seized on those statements, which he described as being well known by the Framers, to declare that the court order to produce invoices was “unreasonable” under the Fourth Amendment and also violated the spirit of the Fifth Amendment protection against self-incrimination⁶³⁴—an altogether remarkable conclusion given that the text of the Fourth Amendment would seem to anticipate the issuance of search warrants for “papers.”⁶³⁵

Indeed, Justice Bradley’s reliance on Lord Camden’s statements was an early instance of fictional originalism. The case report of *Entick* that he treated as evidence of the Framers’ understanding was actually published too late to have significantly informed the Framers’ understanding of the phrase “unreasonable searches and seizures.”⁶³⁶ The specific assertion by Lord

at 300-03 n.1 (discussing the Wilkesite cases, including *Entick*). Because he did not offer any other basis for his claim that the Fourth Amendment precluded search warrants for papers, it appears that he drew that notion from *Entick*. See *id.* at 307 n.1. As I explain below, the reports of *Entick* that Cooley cited actually had somewhat different contents. See *infra* note 637.

⁶³¹ See, e.g., Davies, *supra* note 2, at 732 n.528.

⁶³² *Boyd*, 116 U.S. at 626-30 (quoting and discussing *Entick*). For a discussion of the Wilkesite cases, see *supra* text accompanying note 53.

⁶³³ *Boyd*, 116 U.S. at 629.

⁶³⁴ *Id.* at 630, 631-32, 633, 634.

⁶³⁵ See, e.g., *supra* note 561 (quoting Rawle’s earlier view that the Fourth Amendment permitted specific search warrants for papers).

⁶³⁶ The specific statements in *Entick* that Justice Bradley relied upon had not appeared in the report of that case that had been available in America when the prerevolutionary controversy was at its height. Rather, they were added to a longer report of *Entick* that was not published in London until 1783, after John Adams had introduced the phrase “unreasonable searches and seizures” in the warrant provision in the 1780 Massachusetts Declaration of Rights. See Davies *supra* note 2, at 727 n.512. Thus, Justice Bradley erred in insisting that Camden’s statements were central to the Fram-

Camden that Bradley cited—that a search of papers amounted to compelled self-accusation—had not been included in the earlier report of *Entick* that the Framers would have been familiar with, and that assertion also went well beyond the doctrine of the time.⁶³⁷ *Boyd*, in short, was a classic example of unbridled judicial activism conducted under the cover of “history.” Notably, its creatively expansive construction of the Fourth Amendment came only two years after the same Justices had jettisoned the actual historical content of “due process of law” in *Hurtado*.⁶³⁸

2. *Weeks v. United States* (1914)

Boyd’s aftermath appears to provide a classic example of the law of unintended consequences. The ruling in *Boyd* appears to have so thoroughly precluded the use of court orders or search warrants to obtain business records that it provoked federal prosecutors to develop alternative tactics for gaining access to such records. One tactic appears to have been the invention of the investigative grand jury.⁶³⁹ Another tactic was that some prosecutors exploited the fact that *Boyd* had said nothing about federal officers making warrantless seizures of papers, so they simply resorted to seizing business records without any warrant or court order at all. The Justices’ encounter with a specific instance of the latter approach in 1911⁶⁴⁰ may well have prompted the Justices to expand the Fourth Amendment’s reach to warrantless searches in the seminal 1914 ruling in *Weeks v. United States*.⁶⁴¹

ers’ thought—it is unlikely the Framers were familiar with the statements Bradley quoted.

⁶³⁷ See Davies, *supra* note 2, at 726-28.

⁶³⁸ *Hurtado v. California*, 110 U.S. 516 (1884) (discussed *supra* notes 613-22 and accompanying text).

⁶³⁹ During the framing era, American grand juries simply assessed charged offenses but did not investigate whether additional crimes had occurred until the late nineteenth century. See Davies, *Arrest*, *supra* note 3, at 427-28.

⁶⁴⁰ See Davies, *supra* note 2, at 729 n.516 (discussing the Court’s review, in 1911, of an episode in which a federal prosecutor in New York City had simply made a warrantless seizure of an importing company’s business records and then resisted a federal judge’s order to return the papers).

⁶⁴¹ 232 U.S. 383 (1914).

Weeks is now known primarily as the case that first fully articulated the Fourth Amendment exclusionary rule. Actually, however, the announcement of the exclusionary rule rested on deeper changes that *Weeks* made in the content of Fourth Amendment doctrine.

The facts in *Weeks* were straightforward. *Weeks* was arrested for unlawfully using the mails to promote a lottery.⁶⁴² Shortly after the arrest, a federal marshal had participated in a warrantless search of *Weeks*'s house during which a variety of papers relevant to the charge were seized.⁶⁴³ Before trial, *Weeks*'s attorney moved for the return of the papers, but the trial judge denied the motion, and *Weeks* was convicted.⁶⁴⁴ The Supreme Court reversed *Weeks*'s conviction on the ground that the motion should have been granted and the papers not admitted in evidence.

Justice Day's majority opinion broke new ground when it ruled that the marshal's warrantless search of *Weeks*'s residence and seizure of papers violated the Fourth Amendment.⁶⁴⁵ That was the first occasion on which the Fourth Amendment was applied directly to a warrantless search, and also the first occasion on which the Fourth Amendment was applied to assess *the constitutionality of an ordinary officer's conduct*, rather than of a statute, warrant, or court order.⁶⁴⁶

Additionally, the ruling in *Weeks* was the first to articulate the Fourth Amendment "warrant requirement." As noted above, there had been a common-law rule that only a warrant could justify "breaking" a house (that is, entering through a closed door)⁶⁴⁷—indeed, Coke had treated that rule as a facet of the "law of the land" chapter in Magna Carta.⁶⁴⁸ However, although the Framers almost certainly assumed that that principle would persist, they had not actually stated it in the Fourth Amendment or in any of the earlier state warrant provisions.

⁶⁴² *Id.* at 386.

⁶⁴³ *Id.*

⁶⁴⁴ *Id.* at 388-89.

⁶⁴⁵ *Id.*

⁶⁴⁶ See Davies, *supra* note 2, at 729-30. See also *supra* notes 267-72 and accompanying text.

⁶⁴⁷ See *supra* note 228 and accompanying text.

⁶⁴⁸ See *supra* notes 181-83 and accompanying text.

Justice Day's opinion was the first occasion on which the common-law warrant requirement was explicitly construed to be a facet of the Fourth Amendment itself.⁶⁴⁹

Likewise, Justice Day's opinion was the first to require the exclusion of evidence seized in an unconstitutional search. There was nothing particularly novel about the logic of the nullity of an unconstitutional search that Justice Day employed.⁶⁵⁰ Rather, the reason that *Weeks* was the first case to fully articulate the exclusionary rule was simply that it was the first case to treat an officer's unlawful warrantless search as an instance of unconstitutional government action. Hence, contrary to claims made by some critics of exclusion, the exclusionary rule was not "late" in arriving; rather, it arrived at the same time that the modern conception of officer misconduct as a form of governmental illegality arrived.⁶⁵¹

The fundamental innovations that *Weeks* made in Fourth Amendment doctrine have been widely overlooked in commentaries because the innovative character of those rulings is not immediately apparent on the surface of Justice Day's opinion. As judges are wont to do, Justice Day did not admit to the novelty of the rulings; rather, he finessed these points quite nicely.⁶⁵² Notably, however, Justice Day did not attempt to make a historical case for these novel assertions themselves. Rather, he merely referred in the most general way to *Boyd's* earlier discussion of the Amendment's history.⁶⁵³ Thus, I think it is clear that the Justices who decided *Weeks* were quite aware that their rulings were innovations in constitutional search-and-seizure doctrine.

⁶⁴⁹ See Davies *supra* note 2, at 730. Note, however, that Rawle had previously asserted that the ban against "unreasonable searches and seizures" implied a warrant requirement. See *supra* note 561.

⁶⁵⁰ Of course, the classic statement of the nullity of an unconstitutional government action is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). *Boyd* had previously ruled that invoices produced under an unconstitutional statute could not be admitted as evidence, but had treated that ruling as though it were self-explanatory. See *Boyd v. United States*, 116 U.S. 616, 638 (1886).

⁶⁵¹ See Davies, *supra* note 271, at 622-25.

⁶⁵² See Davies, *supra* note 2, at 730 n.519.

⁶⁵³ *Weeks v. United States*, 232 U.S. 383, 389-91 (1914).

The announcement in *Weeks* of the Fourth Amendment exclusionary rule created a meaningful remedy for unconstitutional searches, and that, in turn, created a steady flow of federal search litigation during the early decades of the twentieth century. As a result, *Weeks* set the development of modern Fourth Amendment doctrine in motion.⁶⁵⁴

In particular, because *Weeks* announced a Fourth Amendment search warrant requirement, it prompted further litigation regarding possible "exceptions" to the warrant requirement. Perhaps because dicta in *Weeks* recognized that common law had long permitted warrantless searches to be made incident to lawful arrests,⁶⁵⁵ it appears that initially was the primary exception. However, the search incident to arrest exception turned out to be incapable of justifying a warrantless search of an automobile in the 1925 Prohibition case, *Carroll v. United States*.⁶⁵⁶

3. *Carroll v. United States* (1925)

In *Carroll*, police officers, who had "probable cause" to believe that a car was being used to transport illegal liquor, stopped and searched the car, seized illegal liquor from it, and arrested the occupants.⁶⁵⁷ In the Supreme Court, Chief Justice Taft's majority opinion recognized that the search could not be justified as a search incident to a lawful arrest.⁶⁵⁸ The reason was that the Prohibition statute made the offense a misdemeanor, but the situation did not meet the *common-law* standard that still applied to a warrantless misdemeanor arrest. Specifically, a warrantless misdemeanor arrest was permitted only when an offense was being committed "in the officer's pres-

⁶⁵⁴ It is generally recognized that the development of modern Fourth Amendment law effectively began with *Weeks*. See, e.g., *United States v. Robinson*, 414 U.S. 218, 224 (1973) (opinion of the Court by Rehnquist, J.) ("Because the rule requiring exclusion of evidence obtained in violation of the Fourth Amendment was first enunciated in *Weeks v. United States* . . . it is understandable that virtually all of this Court's search-and-seizure law has been developed since that time.").

⁶⁵⁵ *Weeks*, 232 U.S. at 392.

⁶⁵⁶ 267 U.S. 132 (1925).

⁶⁵⁷ *Id.* at 160-61. *Carroll* applied an extremely weak notion of "probable cause." See Davies, *supra* note 2, at 731 n.524.

⁶⁵⁸ *Carroll*, 267 U.S. at 168.

ence.”⁶⁵⁹ However, the officers in *Carroll* had not actually observed the commission of any crime prior to the search, so they did not have grounds for a warrantless arrest until after they found and seized the liquor. Thus, Chief Justice Taft acknowledged that the search could not be justified as a search incident to arrest.⁶⁶⁰

Notably, Chief Justice Taft did not suggest that the standard for a valid warrantless arrest was either derived from, or subject to, the Fourth Amendment. Indeed, although he ruled that the police had “probable cause” to believe that there was illegal liquor in the car, he concluded that did *not* justify the misdemeanor arrest. Likewise, he did not suggest that the Supreme Court could alter that arrest standard to fit the circumstances. Indeed, he wrote nothing in *Carroll* that might suggest that the Fourth Amendment regulated a warrantless arrest. Instead, Chief Justice Taft announced that, because automobiles presented an exigency that made obtaining a search warrant impractical in the circumstances, probable cause alone would suffice to justify a *warrantless search* of the car, even though it was not sufficient to justify a *warrantless arrest* of the occupants.⁶⁶¹

To bolster that decidedly novel and rather peculiar claim, Chief Justice Taft also asserted that this new automobile exception to the Fourth Amendment warrant requirement actually comported with the expectations of the Framers of the Fourth Amendment. Specifically, he pointed to the fact that the First Congress that had framed the Fourth Amendment had also passed statutes authorizing a customs officer to make a warrantless search of a ship on the basis of the officer’s own assessment of probable cause of a customs violation.⁶⁶² However,

⁶⁵⁹ *Id.* at 156-57 (“a police officer . . . may only arrest without a warrant one guilty of a misdemeanor if committed in his presence”). See also *supra* note 233.

⁶⁶⁰ *Carroll*, 267 U.S. at 153 (recognizing that defendants were correct insofar as they argued that the seizure of the liquor could not be justified as a search incident to valid arrest).

⁶⁶¹ *Id.* at 158-59. Note that the situation in *Carroll* presented a genuine exigency in 1925 because police did not have radios to call for backup at that time. Notably, the Justices did not revisit that characterization when radios and even telephonic warrants appeared.

⁶⁶² *Id.* at 149-51.

that claim comprised another instance of fictional originalism, because it is apparent that the Framers did not include ships within the scope of the Fourth Amendment's protections of "persons, houses, papers, and effects." Hence, the historic ship search statutes that the Chief Justice cited did not shed any light on the Framers' understanding of the protections of the Fourth Amendment itself.⁶⁶³

Although Chief Justice Taft's opinion in *Carroll* did not invoke a relativistic reasonableness-in-the-circumstances standard in so many words, the exigent circumstances rationale he offered nevertheless effectively extended *Boyd's* earlier "reasonableness" analysis to a circumstantial appraisal of whether a warrant should or should not be required for a search. Thus, the rationale in *Carroll* effectively launched modern, relativistic Fourth Amendment "reasonableness" analysis.⁶⁶⁴

4. The Expansion of the Fourth Amendment to Warrantless Arrests

The search incident to arrest exception from the warrant requirement continued to be a subject of litigation after *Carroll*, and in such cases the Supreme Court typically assessed the le-

⁶⁶³ It does not appear that anyone had suggested prior to *Carroll* that ships fell within the Fourth Amendment's formula of "persons, houses, papers, and effects." Rather, because the Framers were well versed in the controversy regarding the appropriate scope of admiralty jurisdiction, they were undoubtedly aware that ships, as civil law personalities in admiralty, fell outside of the common law's protection. Thus, it would not have occurred to the members of the First Congress that the warrant standards in the Fourth Amendment had any relevance to ship searches. That is also the likely explanation why none of the roughly one hundred ship seizure cases the Supreme Court decided prior to *Carroll* ever mentioned the Fourth Amendment. See Davies, *supra* note 2, at 604-08. Nevertheless, *Carroll's* fictional claim regarding the ship search statutes has been invoked in more recent opinions applying the Fourth Amendment. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 300-02 (1999); *Florida v. White*, 526 U.S. 559, 563-65 (1999).

⁶⁶⁴ *Carroll*, 267 U.S. at 132. Although *Boyd* had previously ruled a statute to be "unreasonable" and therefore a violation of the Fourth Amendment, that assessment was based on a statement of a formal limit on government authority, not on a relativistic appraisal of the circumstances. *Boyd v. United States*, 116 U.S. 616 (1886). Thus, modern reasonableness-in-the-circumstances analysis began with *Carroll*, not *Boyd*. See Davies, *supra* note 2, at 728, n.514.

gality of the arrest as a preliminary matter.⁶⁶⁵ However, as had been the case in *Carroll*, the Justices assessed the validity of the arrest in terms of then-prevailing common-law or statutory standards, rather than in terms of the requirements of the Fourth Amendment itself.⁶⁶⁶ The reason for that focus appears to be that, in the federal cases that reached the Supreme Court during the first half of the twentieth century, the applicable common-law and statutory standards for assessing warrantless arrests still were more rigorous than the “probable cause” standard for arrest warrants set out in the Fourth Amendment.

⁶⁶⁵ The lawfulness of the arrest was part of the common-law search incident to arrest doctrine itself. Thus, this was not really a “fruit of poisonous tree” analysis under Fourth Amendment.

⁶⁶⁶ For example, in *United States v. Di Re*, 332 U.S. 581 (1948), counterfeit gasoline coupons had been found on the defendant in a search of his person following a warrantless arrest. Although *Di Re* had been sitting in a car prior to his arrest, Justice Jackson’s opinion for the Court ruled that the search did not fall under the automobile exception announced in *Carroll*, and also ruled that the search was not justified as a search incident to a lawful arrest because the police officers had no information regarding *Di Re*’s criminal conduct at the time of the arrest. *Id.* at 587, 591-92. The significant point for present purposes is that, although Justice Jackson referred to the Fourth Amendment in assessing the invalidity of the search under *Carroll*, and although he referred generally to “our Constitution . . . plac[ing] obstacles in the way of a too permeating police surveillance” at the end of the opinion, he referred only to *statutory* authority when assessing the invalidity of the arrest. *Id.* at 587, 595.

Justice Jackson’s discussion of “the circumstances and the law of arrest” was somewhat complex because the government had offered shifting justifications for the arrest. *Id.* at 587. The government ultimately argued that the warrantless arrest had been for the federal felony offense of conspiracy. *Id.* at 591. Justice Jackson concluded that no act of Congress provided “a rule for arrest without warrant . . . which controls such a case as we have here and none that purports to create a general rule on the subject.” *Id.* at 590. See also *id.* at 591 (stating that “[n]o act of Congress lays down a general federal rule for arrests without warrant for federal offenses”). Thus, he concluded that “in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity.” *Id.* at 589.

Because the arrest had occurred in New York and the government argued that the arrest was for a felony, the relevant New York statutory provision was that “[a] peace officer may, without a warrant, arrest a person . . . when a felony has in fact been committed, and [the peace officer] has reasonable cause for believing the person to be arrested to have committed it.” *Id.* at 589 n.7 (indicating that the government relied on this statutory section). Thus, Justice Jackson concluded that “the New York statute provides the standard by which this arrest must stand or fall.” *Id.* at 591. In discussing “that law,” Justice Jackson referred to the “reasonable grounds” required in the statute, then shifted to “probable grounds,” and then concluded that “probable cause” could not be based merely on *Di Re*’s presence in an automobile and the absence of any protest of innocence to the officers. *Id.* at 591-94. Thus, in the structure of the opinion, Justice Jackson’s references to the lack of “probable cause” to support the warrantless arrest referred only to the New York statutory standard, not to the Fourth Amendment itself.

The difference between statutory arrest standards and the Fourth Amendment probable cause standard was especially evident in the initial federal statutory provisions regarding warrantless arrests. Prior to the 1930s, there were no federal statutory standards for warrantless arrests by federal officers; rather, such arrests were subject to the law of the state in which the arrest was made.⁶⁶⁷ When Congress began to enact federal warrantless arrest statutes in the 1930s, it did not follow the state courts that had adopted bare probable cause standards, but rather returned to the earlier and more rigorous common-law standards. Specifically, the federal warrantless arrest statutes initially required both (1) the commission of a felony-in-fact and (2) reasonable cause of suspicion that the arrestee had committed the felony⁶⁶⁸—that is, the old common-law standard

⁶⁶⁷ See *supra* note 491.

⁶⁶⁸ In a 1950 opinion, Chief Judge Learned Hand described the historical development of federal statutory authority for warrantless arrests by Federal Bureau of Investigation agents as follows:

Until 1934 no federal law gave any power to agents of the Federal Bureau of Investigation to arrest either with or without warrant, although there had been on the books since 1795 a statute giving to marshals the powers of arrest without warrant possessed by state sheriffs and their deputies. In 1934 Congress passed the law which is now § 3052 of the Criminal Code, and which, when introduced in the House, granted power to agents of the Bureau as follows: "to make arrests without warrant for felonies cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony." This bill was referred to the Judiciary Committee, which reported it out favorably, but with the addition of the words: "and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest" In this form it passed the House without comment, but in the Senate it was still further amended by the addition after the word, "felonies," of the phrase, "which have been committed"; and in that form it passed

United States v. Coplon, 185 F.2d 629, 634 (2d Cir. 1950). (I assume that the "1795" statute Chief Judge Hand referred to is the statute discussed *supra* notes 491, 599). Thus, the 1934 provision was originally drafted to provide for warrantless arrests based simply on probable cause that a federal felony was committed, but a felony-in-fact requirement was added to it before final passage.

Justice Jackson also noted the statutory felony-in-fact requirement for warrantless arrests by federal officers in his 1948 majority opinion in *United States v. Di Re*, 332 U.S. 581. In that case, federal officers had seized counterfeit gasoline coupons from Di Re during a search incident to a warrantless arrest. The government initially argued that the arrest was lawful under a New York statute, but then shifted and argued that Di Re's arrest was valid under federal law. *Id.* at 588-89. Justice Jackson described the state of federal statutory authority for warrantless arrests as follows:

for a warrantless felony arrest.⁶⁶⁹ However, there was a discrepancy: the federal statute that made an unlawful arrest by a federal officer a misdemeanor offense made the officer's "reasonable grounds" to suspect commission of a felony a defense to that offense, even if there were no actual felony.⁶⁷⁰ Thus, the defense to the federal crime of false arrest was broader than the statutory authority for a federal officer to make a warrantless arrest. Some of the initial federal warrantless arrest statutes also limited the warrantless arrest authority of certain federal officers to instances in which the officers had reasonable grounds to fear that the person to be arrested would escape while an arrest warrant was being obtained.⁶⁷¹

However, the federal arrest statutes were subsequently amended to enlarge the warrantless arrest authority of federal officers. In 1948, the felony-in-fact requirement was deleted and federal officers were authorized to arrest without warrant

Turning to the Acts of Congress to find a rule for arrest without warrant, we find none which controls such a case as we have here and none that purports to create a general rule on the subject. If we were to try to find or fashion a federal rule for arrest without warrant, it appears that the federal legislative materials are meager, inconsistent, and inconclusive. Federal Bureau of Investigation officers are authorized only "to make arrests without warrant for felonies *which have been committed* and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. [Footnote citing "48 Stat. 1008, 49 Stat. 77, 5 U.S.C. § 300 (a)."] However, marshals and their deputies "shall have the power to make arrests without warrant for any offense against the laws of the United States committed in their presence or for any felony cognizable under the laws of the United States in cases where *such felony has in fact been or is being committed* and they have reasonable grounds to believe that the person to be arrested has committed or is committing it" [footnote citing "49 Stat. 378, 28 U.S.C. § 504 (a)"], and they are also given the same powers as sheriffs in the same state may have, by law, in executing the laws thereof [footnote citing 1 Stat. 425, 12 Stat. 282, 28 U.S.C. § 504"].

Id. at 590 (emphasis added).

⁶⁶⁹ See *supra* notes 222, 239 and accompanying text, and note 257.

⁶⁷⁰ Justice Jackson's opinion in *Di Re* also noted that the federal statute that made an unlawful arrest by an officer a misdemeanor provided that it should not apply to an officer who made a warrantless arrest of a person "who has committed, or who is suspected on reasonable grounds of having committed, a felony." 332 U.S. at 590-91 (citing 49 Stat. 877, 18 U.S.C. § 53 (a)).

⁶⁷¹ See *supra* note 670.

when a federal offense was committed "in their presence" or when they had "reasonable grounds to believe that the person to be arrested has committed or is committing" a federal felony.⁶⁷² Shortly thereafter, in 1950, Congress also eliminated the limitation of warrantless arrest authority to instances in which obtaining a warrant would create a risk of escape.⁶⁷³

However, it was not until 1959, in *Draper v. United States*,⁶⁷⁴ that the Supreme Court announced that the "reasonable grounds" standard in the amended federal warrantless arrest statutes was equivalent to the Fourth Amendment's "probable cause" standard. The warrantless arrest in *Draper* was made under the authority of Section 104(a) of the Narcotic Control Act.⁶⁷⁵ Justice Whittaker's opinion stated that

The crucial question for us then is whether knowledge of the related facts and circumstances gave [the arresting officer] "probable cause" within the meaning of the Fourth Amendment, and "reasonable grounds" within the meaning of § 104(a)

⁶⁷² See *Coplon*, 185 F.2d at 634 (noting that "the recension of Title 18 which became effective in 1948 . . . struck out the phrase [which have been committed]"). Thereafter, FBI agents could make warrantless arrests simply on probable cause that a felony had been committed. See also 18 U.S.C. § 3052 (statutory warrantless arrest authority for FBI officers).

⁶⁷³ The statutory requirement that there be reasonable grounds to believe that the person to be arrested was likely to escape before a warrant could be obtained was deleted in 1950 in response to a ruling earlier that year in an espionage case by the Second Circuit Court of Appeals in *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950). In *Coplon*, Chief Judge Learned Hand's opinion concluded that a warrantless arrest by FBI agents was illegal because the federal statute then in effect did not permit FBI agents to make a warrantless felony arrest unless there were reasonable grounds to believe that the person to be arrested was likely to escape before a warrant could be obtained. *Id.* at 633-35. Chief Judge Hand noted that at common law any private person could make a warrantless arrest for a felony committed in his presence. *Id.* at 634. However, he construed the existing federal statutory authority to disallow such a warrantless arrest by a federal agent unless the agent had reason to fear that the person to be arrested would escape. *Id.* Thus, he concluded that the statute gave FBI agents a more limited warrantless arrest authority than that possessed by a private person. *Id.* at 634-35. Because there was no basis for such a fear in the facts, the court concluded that the arrest was illegal, and evidence seized during the arrest was inadmissible.

Congress quickly responded and deleted the risk of escape requirement later in the same year. Instead, Congress substituted explicit statutory authority for federal officers to arrest for federal felonies committed in their presence. See *Coplon v. United States*, 191 F.2d 749, 753-55 (D.C. Cir. 1951).

⁶⁷⁴ 358 U.S. 307 (1959).

⁶⁷⁵ *Id.* at 310 (citing 26 U.S.C. (Supp. V) § 7607, added by § 104 (a) of the Narcotic Control Act of 1956, 70 Stat. 570).

... to believe that petitioner had committed or was committing a violation of the narcotic laws.⁶⁷⁶

The Court found that the facts did satisfy that standard and also announced that “[t]he terms ‘probable cause’ as used in the Fourth Amendment and ‘reasonable grounds’ as used in § 104(a) of the Narcotic Control Act, 70 Stat. 570, are substantial equivalents of the same meaning.”⁶⁷⁷ Thus, after *Draper* warrantless arrests by federal officers were assessed simply in terms of the probable cause standard of the Fourth Amendment itself.

Of course, the federal constitutional standard for warrantless arrests gained heightened importance after the Fourth Amendment was incorporated and made applicable to the states in *Elkins v. United States*⁶⁷⁸ in 1960 and *Mapp v. Ohio*⁶⁷⁹ in 1961.⁶⁸⁰ Thereafter, statements in the 1976 ruling in *United States v. Watson*⁶⁸¹ also made it clear that probable cause alone would suffice to meet the Fourth Amendment constitutional standard for a warrantless arrest by a state officer.⁶⁸²

⁶⁷⁶ *Id.* at 310.

⁶⁷⁷ *Id.* at 311 n.3. Justice Whittaker cited two court of appeals decisions to the same effect: *United States v. Walker*, 246 F.2d 519, 526 (7th Cir. 1957), and *United States v. Bianco*, 189 F.2d 716, 720 (3rd Cir. 1951). See also *Henry v. United States*, 361 U.S. 98, 100 (1959):

The statutory authority of FBI officers and agents to make felony arrests without a warrant is restricted to offenses committed “in their presence” or to instances where they have “reasonable grounds to believe that the person to be arrested has committed or is committing” a felony. 18 U.S.C. § 3052, 18 U.S.C.A. § 3052. *The statute states the constitutional standard*, for it is the command of the Fourth Amendment that no warrants for either searches or arrests shall issue except “upon probable cause, supported by Oath or affirmation”

Id. (emphasis added).

⁶⁷⁸ 364 U.S. 80 (1960).

⁶⁷⁹ 368 U.S. 871 (1961).

⁶⁸⁰ Commentaries frequently assert that the Fourth Amendment was incorporated into the Fourteenth Amendment’s Due Process Clause and applied to the states in *Wolf v. Colorado*, 338 U.S. 69 (1949). I do not think that is accurate. See *Davies, supra* note 271, at 626 n.24.

⁶⁸¹ 423 U.S. 411 (1976).

⁶⁸² *Watson* also made it clear that there was no constitutional requirement that an arrest warrant be obtained if it was feasible for the arresting officers to do so. *Id.* Earlier federal warrantless arrest statutes had included that requirement. See *supra* note 670.

The arrest by the federal postal officer in *Watson* was made pursuant to a federal postal statute that authorized arrests on probable cause that a crime had been committed, without any requirement that a crime actually have been committed.⁶⁸³ Justice White's opinion for the Court asserted that the statutory standard was valid because "common law generally authoriz[ed] felony arrests on probable cause, but without a warrant"⁸⁹—a statement that finessed the historical facts that common law had limited lawful warrantless felony arrests to instances in which a felony had been committed in fact,⁶⁸⁴ and that that requirement had been included in the initial federal warrantless arrest statutes.⁶⁸⁵

Dicta in *Watson* also endorsed the constitutionality of the then recently proposed Model Code of Pre-Arrest Procedure, which called for permitting state officers to make warrantless arrests "if the officer has reasonable cause to believe

⁶⁸³ The warrantless arrest in *Watson* was based not on the federal statutes that authorized FBI agents or federal marshals to make warrantless arrests, but was instead based on a recent statute that provided that postal officers were authorized to "make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony." *Watson*, 423 U.S. at 415 (quoting 18 U.S.C. § 3061(a)(3)). Justice White's opinion in *Watson* indicated that the statutory authority for postal officers to make warrantless felony arrests on probable cause dated back to 1955, but had been the subject of "confusion" until a statutory revision in 1968. *Id.* at 415 n.4.

Justice White's opinion in *Watson* relied upon a statement in *Carroll v. United States*, which did not involve a warrantless felony arrest, in which Chief Justice Taft stated loosely that "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence." 267 U.S. 132, 156 (1925); see also *Watson*, 423 U.S. at 417 (quoting *Carroll*). Although White's opinion in *Watson* did not call attention to the earlier felony-in-fact requirement, the requirement was apparent in another statement in *Carroll*, which provided that "the reason for [the broader authority for] arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant." Justice Taft's reference to a "reliable report of a felony" may have referred to the common-law requirement that a felony had been committed in fact.

⁶⁸⁴ Justice White also referred to the "the ancient common-law rule that a peace officer was permitted to . . . arrest for a felony not committed in his presence if there was reasonable ground for making the arrest." *Watson*, 423 U.S. at 418 (citing historical commentaries and the English decisions in *Samuel* and *Beckwith*, discussed *supra* at notes 579-83, 589-92 and accompanying text). Note that Justice White's phrasing finessed the earlier felony-in-fact requirement: it mentioned "a felony" but did not call attention to the requirement of an actual felony.

⁶⁸⁵ See also *supra* note 669 and accompanying text.

that such person has committed" a felony, but without requiring that a felony actually have been committed.⁶⁸⁶ In effect, that proposed model endorsed broad state warrantless arrest authority for any offense that might be classified a felony.⁶⁸⁷ Thus, *Draper* and *Watson* indicated that statutory authority for a warrantless arrest would pass constitutional muster provided only that the statute required that an arresting officer have probable cause that a crime had been or was being committed. In effect, the Justices extended the probable cause standard that the Fourth Amendment explicitly required for issuance of an arrest warrant to also suffice to justify a warrantless arrest made on an officer's own initiative.

In addition to endorsing bare probable cause as the only requisite for a constitutional arrest, several additional Supreme Court rulings during the latter half of the twentieth century further expanded the breadth of police discretion by significantly relaxing the traditional threshold of the "probable cause" standard itself, particularly with regard to the use of second-hand hearsay information from informants. In the 1959 ruling in *Draper*, the Justices explicitly rejected the common-law requirement that an arresting person have personal suspicion and instead permitted probable cause for a warrantless arrest to be based on hearsay information that an officer learned from an informant.⁶⁸⁸ A year later, the Justices also explicitly approved the use of hearsay information to establish probable cause for issuance of a warrant.⁶⁸⁹ A few years later, the Warren Court's

⁶⁸⁶ 423 U.S. at 422-23, nn.11-12.

⁶⁸⁷ The shift to the probable cause alone standard is especially significant in modern arrest practice because modern criminal law defines many more offenses as felonies than was the case in 1789, and it appears that most "felony" arrests are prosecuted only as misdemeanors. *See supra* note 592. Hence, the deletion of the requirement that a felony had been committed "in fact" appears to have cleared the way for police to avoid the more stringent "committed in the presence of the officer" standard for misdemeanor arrests by making arrests under the felony probable cause arrest standard even when the offense for which probable cause existed would likely be prosecuted only as a misdemeanor.

⁶⁸⁸ *See supra* note 603. Because it appears that hearsay was already widely used to establish probable cause for warrantless arrests by the time *Draper* was decided, *see supra* note 603, this ruling is best understood as simply removing any issue regarding the constitutionality of the existing practice.

⁶⁸⁹ *See id.*

1967 ruling in *McCray v. Illinois* also allowed police officers to base probable cause for a warrant on hearsay information without disclosing the identity of the informer to the issuing magistrate.⁶⁹⁰ As a practical matter, that ruling made it virtually impossible for a defendant to challenge the factual validity of allegations made in a warrant affidavit and effectively opened the way for police to invent imaginary informants and manufacture probable cause. As a result, the Fourth Amendment "oath or affirmation" requirement was stripped of any significant meaning.

The Burger Court also relaxed the threshold for probable cause when it later ruled, in 1983 in *Illinois v. Gates*—a case involving information from an anonymous informant—that "probable" cause required only a showing of a "substantial chance" that criminal activity was occurring or had occurred.⁶⁹¹ Indeed, the *Gates* majority found there was probable cause for issuance of a search warrant even though the police investigation of the anonymous tip disclosed that the informant's information was incorrect in several significant ways.⁶⁹² Hence, *Gates* reduced "probable" cause to a rather minimalist standard—one that effectively allows police officers to exercise a significant level of discretionary arrest authority.

The relaxed definition of probable cause also appears to portend an expansion of police misdemeanor warrantless arrest authority. In 2001, the Justices ruled that the Fourth Amendment "reasonableness" standard does not bar custodial arrests for minor traffic violations,⁶⁹³ and language in that and several other recent Supreme Court decisions seems to endorse replacing the traditional common-law restriction of warrantless misdemeanor arrests to instances in which the offense was committed in the presence of the arresting officer with a simple probable cause standard.⁶⁹⁴ Thus, it appears that the Court is

⁶⁹⁰ 386 U.S. 300 (1967).

⁶⁹¹ 462 U.S. 213 (1983). See also *supra* note 41 and accompanying text.

⁶⁹² *Gates*, 462 U.S. at 246.

⁶⁹³ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). I have previously criticized both the purportedly originalist analysis and the policy claims made in this decision. See Davies, *Arrest*, *supra* note 3.

⁶⁹⁴ See Davies, *Arrest*, *supra* note 3, at 367-87.

poised to permit police officers to make warrantless arrests for even minor regulatory offenses on the basis of second-hand hearsay information from an undisclosed informer.

Of course, the extension of the Fourth Amendment to warrantless arrests has also meant that arrest standards have become subject to a relativistic “Fourth Amendment reasonableness” analysis. In 1968, the Warren Court drew upon the modern reasonableness standard to create an entirely new doctrine of constitutional “detentions” and “frisks” in *Terry v. Ohio*.⁶⁹⁵ Although any interference with a person’s liberty had been regarded as “arrest” and “imprisonment” at common law,⁶⁹⁶ the Justices ruled in *Terry* that the Fourth Amendment permits police to make a temporary warrantless detention of a person—that is, a seizure less than a full “custodial arrest”—provided the police have “reasonable suspicion” that the person had been, was, or was about to be, engaged in criminal activity. Additionally, *Terry* also authorized police to conduct a limited warrantless frisk for weapons provided they had “reasonable suspicion” that the suspected person who was being detained was armed or dangerous.⁶⁹⁷

Moreover, *Terry* presented “reasonable suspicion” as a lower threshold than “probable cause” and indicated that it would be satisfied provided the officer could articulate some fact or observation that gave rise to suspicion. Although the Warren Court Justices may have viewed *Terry* primarily as an extension of federal constitutional regulation to previously unregulated street encounters between police and citizens, the minimal threshold for “reasonable suspicion” created in that decision also has had the effect of constitutionalizing discretionary police conduct. That is especially so because later cases have defined “reasonable suspicion”—which also can be based on hearsay information from undisclosed informants—rather minimally.⁶⁹⁸

⁶⁹⁵ 392 U.S. 1 (1968).

⁶⁹⁶ The distinction drawn in *Terry* between “detentions” and “arrests” is inconsistent with the framing-era understanding that *any* restraint of personal liberty was an arrest and an imprisonment. See *supra* note 284. See also Davies, *supra* note 2, at 629 n.216.

⁶⁹⁷ The *Terry* “frisk” doctrine has also been extended to automobiles. See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983).

⁶⁹⁸ See, e.g., *Alabama v. White*, 496 U.S. 325 (1990); *Adams v. Williams*, 407 U.S. 143 (1972); but see *Florida v. J.L.*, 529 U.S. 266 (2000).

Although the discussion in this Part has focused on the expansion of police warrantless arrest authority itself, it should be noted that that expansion has occurred in the context of a much broader enlargement of government investigative power. Recent Supreme Court decisions also have restricted the scope of Fourth Amendment protections by adopting narrow definitions of "search"⁶⁹⁹ and "seizure,"⁷⁰⁰ as well as by adopting a flexible and undemanding definition of "consent" to search.⁷⁰¹ Similarly, recent decisions have relaxed Fourth Amendment standards by adopting expansive views of the various exceptions to the warrant requirement,⁷⁰² by removing prior prohibitions against pretextual police conduct,⁷⁰³ by permitting suspicionless administrative inventory searches of impounded vehicles and arrestees,⁷⁰⁴ and by permitting suspicionless searches on the basis of the "special needs" of various government institutions.⁷⁰⁵

In addition, recent decisions have severely restricted enforcement of Fourth Amendment standards by adopting a narrow conception of the personal "standing" required to contest a Fourth Amendment issue,⁷⁰⁶ by generally permitting unconstitutionally seized evidence to be admitted in the various procedural stages of a criminal prosecution other than the prosecutor's case-in-chief at trial,⁷⁰⁷ and by creating several exceptions to the exclusionary rule that even permit use of unconstitution-

⁶⁹⁹ See, e.g., *Smith v. Maryland*, 442 U.S. 735 (1979); *Florida v. Riley*, 488 U.S. 445 (1989).

⁷⁰⁰ See, e.g., *California v. Hodari D.*, 499 U.S. 621 (1991); *United States v. Drayton*, 536 U.S. 194 (2002).

⁷⁰¹ See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

⁷⁰² See, e.g., *California v. Carney*, 471 U.S. 386 (1985); *Thornton v. United States*, 541 U.S. 615 (2004).

⁷⁰³ See, e.g., *Whren v. United States*, 517 U.S. 806 (1996).

⁷⁰⁴ See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Illinois v. Lafayette*, 462 U.S. 640 (1983).

⁷⁰⁵ See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

⁷⁰⁶ See, e.g., *United States v. Payner*, 447 U.S. 727 (1980); *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

⁷⁰⁷ See, e.g., *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Havens*, 446 U.S. 620 (1980).

ally seized evidence in the prosecutor's case-in-chief at trial.⁷⁰⁸ Additionally, recent decisions have given a broad interpretation to the independent source doctrine.⁷⁰⁹ Indeed, in a 2006 ruling endorsing a broad notion of the doctrine that the taint of unconstitutional police conduct can become too "attenuated" to require exclusion, four Justices indicated their inclination to abolish the exclusionary rule entirely.⁷¹⁰

The bottom line is that, although the Supreme Court resurrected search-and-seizure rights in the form of the Fourth Amendment during the early part of the twentieth century, the Justices have subsequently dismantled the substance of those rights, especially during the last four decades. The net result is that search-and-seizure doctrine now increasingly amounts to merely a hollow rhetoric of rights.

VI. CONCLUSION

The authentic history of constitutional search-and-seizure doctrine is not the story of a fixed or continuous understanding. In contrast to the conventional account of Fourth Amendment history, authentic search-and-seizure history is a story of change, transformation, and discontinuity. Indeed, in a very real sense it is a story of a constitutional failure.

It appears that the State and Federal Framers probably perceived common-law arrest standards to be uncontroversial and permanent. Probably for that reason, the Framers thought that constitutional provisions invoking the traditional formulations of "the law of the land" or "due process of law" would generally be adequate to constitutionalize the common-law limitations on arrest and search authority. However, because there had been specific controversies over the validity of general warrants, and because general warrants threatened to breach the common law's general disapproval of discretionary arrest or search authority, the Framers also adopted additional provisions that banned such warrants by explicitly setting minimum

⁷⁰⁸ See, e.g., *United States v. Leon*, 468 U.S. 897 (1984); *Illinois v. Krull*, 480 U.S. 340 (1987).

⁷⁰⁹ See, e.g., *Murray v. United States*, 487 U.S. 533 (1988).

⁷¹⁰ *Hudson v. Michigan*, 547 U.S. 586 (2006).

standards of cause and particularity for the issuance of warrants. The combination of those two types of provisions probably appeared to be sufficient to ensure the persistence of common-law search-and-seizure standards.

However, during the nineteenth century, judges abandoned the Cokean common-law tradition that had informed the original understandings of the "law of the land" and "due process of law" constitutional provisions. The historical evidence indicates that the accusatory warrantless arrest standards had withered by the middle of the nineteenth century, and had largely collapsed by its end, as state courts undertook to facilitate more aggressive forms of policing. Meanwhile, judges continued to view the warrant provisions simply as bans against too-loose warrants. Hence, warrantless arrest standards were effectively deconstitutionalized.

Viewed from the perspective of our own time, the collapse of the rigorous common-law arrest standards has an air of inevitability about it. English Whigs had developed the common-law warrantless arrest standards to blunt the prerogative power of the English crown. However, while those standards may have been adequate for enforcing criminal law in a close-knit society in which the inhabitants generally knew one another and one another's business, it seems fairly apparent that rigorous accusatory standards were inappropriate and unworkable for an urbanizing society in which persons increasingly interacted as strangers.

Thus, the shift in outlook toward criminal justice in the decades following the framing era also seems understandable from a modern perspective. When the Framers drafted and adopted constitutional provisions, they were still preoccupied with the fear of government oppression that had animated the Revolutionary period. However, by the mid-nineteenth century the political and legal elite had lost that fear and instead became preoccupied with suppressing crime in fast-growing cities. As a result, the perceived imperatives of law enforcement overcame the earlier concern with individual liberty, and the earlier constitutional limitations on the arrest power of peace officers were either conveniently forgotten or deliberately abandoned.

The difficulty is that the state courts did not formulate any alternative meaningful regulation of the new governmental investigatory power. Instead, the Federal Supreme Court eventually stepped in to reconstruct constitutional search-and-seizure doctrine—but did so under the Fourth Amendment, rather than under the Due Process Clauses of the Fifth and Fourteenth Amendments. However, although the Justices initially attempted to formulate rules to regulate searches, that project soon lapsed into a relativistic assessment of the “reasonableness” of police conduct. Unsurprisingly, as crime control imperatives again took center stage during the latter half of the twentieth century, the flexible “reasonableness” formulation provided a platform for the Justices to largely undo the earlier set of Fourth Amendment rules. The result is that, once again, there are few meaningful constitutional constraints on police power.

What implications does this history hold for the way we should now think about search-and-seizure doctrine? Readers likely will draw their own implications. I suggest three.

A. The Fictional Character of Recent “Originalist” Search-and-Seizure Claims

One implication of the authentic history is that it reveals that an “originalist” methodology cannot resolve contemporary search-and-seizure issues. The originalist claims that have appeared in recent search-and-seizure decisions are typically cast as corrections to relatively recent and discrete deviations from the intended meaning of the Fourth Amendment. Indeed, one recent search-and-seizure opinion has asserted that there can be an “unchanging Constitution” even though that Constitution “refers to other bodies of law that might themselves change.”⁷¹¹ However, that notion simply is not realistic.

⁷¹¹ *Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J. dissenting). It is worth noting that *Randolph* illustrates the essential triviality of much of what now passes for Fourth Amendment rights. In that case, the majority ruled that where two co-residents are present when police seek to search a house, and one consents but the other objects, there is no consent. However, that ruling is qualified to apply only when the objecting co-resident “is in fact at the door” but does not “impose a requirement [of seeking out any co-resident to learn his or her wishes]” before acting on the other co-resident’s con-

The salient historical fact is that state and federal judges have been deviating from earlier understandings, and announcing novel standards, for more than two centuries since the framing era. There is irony in the fact that judges transformed search and seizure. The Framers had perceived that legislatures posed the primary threat to the preservation of common-law securities, but expected courts to preserve those rights against legislative incursions. In actuality, judges made the doctrinal changes that destroyed the accusatory protections the Framers thought they had preserved. The fact that changes were made is not apparent on the face of the individual opinions, because the judges rarely acknowledged the innovations they made. However, the changes are plain enough if one compares the rules announced in earlier cases with the standards announced in later cases.

Of course, there have also been drastic changes in criminal justice institutions. In particular, the modern police officer, and the modern police department, bears little resemblance to the framing-era constable working under the direction of the justice of the peace.

Hence, the authentic history of search-and-seizure reveals that a large gulf separates framing-era doctrinal conceptions and criminal justice institutions from our current conceptions and institutions. The story is not one of simple changes in particular rules or standards; rather it is a story of a fundamental transformation amounting to a paradigm shift. Modern investigatory procedure confers powers on police officers that *contravene and violate* not only the specific rules of framing-era common law, but also the basic principles and values that led the Framers to endorse accusatory procedure.

The bottom line is that there is no way that we can now "return" to the original understanding of the constitutional limits on government arrest and search power—and it is quite doubtful that it would be desirable to do so, even if we could. Too much has changed.

sent. Hence, while the opinion recognizes the right of the objecting co-resident in form, that right is hardly of any operational significance, and police can easily avoid it.

*B. The Overall Trajectory of Constitutional
Search-and-Seizure Doctrine*

Although authentic history cannot provide us with a basis for deciding the specific search-and-seizure issues that arise today, it does provide a broader perspective on where we have come from, and where we seem to be going. The conventional account of Fourth Amendment history has tended to legitimize the current content assigned to “Fourth Amendment reasonableness” by falsely assuring us that constitutional search-and-seizure has always involved a relativistic balancing of individual rights against government interests. Indeed, the conventional history has smoothed the way for further expansions of government power under that rubric. In contrast, the authentic history suggests a far more skeptical outlook.

The authentic history reveals a doctrinal trajectory that has turned away from an insistence on an individual’s right to be secure from unnecessary government intrusions and toward an acceptance of an ever-enlarging sphere of government authority to intrude. That trajectory warns us that we should not be confident that current doctrine has reached the right relationship between the individual and the state—especially because the recent construction of “Fourth Amendment reasonableness” has often been justified by fictional history. While there is little doubt that some enlargement of governmental search-and-seizure power was necessary, that general conclusion does not answer the question of how much enlargement of power was appropriate. Thus, the recovery of the authentic history invites us to disregard the distractions of fictional originalism and instead refocus attention on the important question—whether current doctrine provides an adequate “right to be secure” from excessive and unnecessary government power.

*C. Whether State Courts Should be Free to
“Depart” from Current Federal Doctrine*

Finally, the recovery of the authentic history holds an implication for the larger issue of the present symposium—whether it is legitimate for state courts, interpreting state constitutional provisions, to “depart” from the search-and-seizure

rulings announced by the Federal Supreme Court under the Fourth Amendment. Because that is a multifaceted inquiry, authentic search-and-seizure history cannot provide a comprehensive answer. Nevertheless, the authentic history does remove a factor that may have seemed to weigh against the legitimacy of state court "departures."

It is evident that the search-and-seizure provisions in the declarations of rights adopted by the original states and those included in the Federal Bill of Rights drew upon the same common-law foundations. Likewise, it is evident that the search-and-seizure provisions in the declarations of rights that the later states adopted were largely modeled on those in the Federal Bill. Hence, if it were the case that the Fourth Amendment decisions of the Federal Supreme Court articulated an accurate rendition of an original content that was shared by the state and federal constitutional search-and-seizure provisions, that might seem to be a factor that would weigh heavily against the legitimacy of state court "departures." However, that is not the case. Instead, the authentic history shows that both state and federal rulings long ago departed from the original understanding of the search-and-seizure provisions. Current Fourth Amendment doctrine is only the product of relatively recent, ideologically-driven judicial choices, not a rendition of the original understanding.

Hence, if state judges come to the conclusion that their citizens should be entitled to stronger search-and-seizure protections than those currently provided by federal rulings, authentic search-and-seizure history should not impede them from acting on that judgment.

STATE CONSTITUTIONAL METHODOLOGY IN SEARCH AND SEIZURE CASES

*Robert F. Williams**

Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own state harmless-error rule to such errors of state law.

Justice Hugo Black¹

[U]nmistakably, a high state court judge and a United States Supreme Court Justice must often look at the same case with different eyeglasses.

Justice William J. Brennan, Jr.²

I. INTRODUCTION

Justice Black's statement above, of course, expresses a truism. Whether one sees federal constitutional search and seizure

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I would also like to thank my colleague, Dennis Braithwaite, for his valuable comments on the article.

¹ *Cooper v. California*, 386 U.S. 58, 62 (1967). Many state courts make similar statements. See, e.g., *State v. Askerooth*, 681 N.W.2d 353, 361-62 (Minn. 2004).

² William J. Brennan, Jr., *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225, 227 (1966). See William J. Brennan, Jr., *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 949 (1964), where Justice Brennan contends that the roles of state supreme court justices and United States Supreme Court Justices, even in the same case, are functionally different.

standards as the national “lowest common denominator”³ or the national “highest common denominator,”⁴ it is clear that state courts are “permitted to reject a federal ‘one-size-fits-all’ approach to the interpretation of state constitutional rights.”⁵ This is no longer viewed as a “cute trick,”⁶ an exercise of “Chutzpah,”⁷ or “simply a flexing of state constitutional muscle.”⁸ State courts, however, may not impose such higher standards according to their view of *federal* constitutional law.⁹

If one were to pursue a case study of state courts interpreting their state constitutions to be more protective than the Federal Constitution, a phenomenon now referred to as the New Judicial Federalism (NJF),¹⁰ search and seizure cases would provide the best material. This is a good point in time at which to survey and evaluate these methodologies for the benefit of lawyers, state judges,¹¹ and scholars who will be involved with state constitutional search and seizure cases in the future. In fact, the field of criminal procedure generally has, in many ways, provided the driving force behind the NJF. It is in this area, and more particularly in search and seizure cases, that state courts realized

³ Alderwood Assocs. v. Wash. Env'tl. Council, 635 P.2d 108, 115 (Wash. 1981) (citing *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 290 (1973) [hereinafter *Project Report*]) (emphasis added).

⁴ Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992) (emphasis added).

⁵ State v. Stanton, 820 A.2d 637, 664 (N.J. 2003) (Albin, J., dissenting).

⁶ H.C. Macgill, *Introduction: Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982) (“There probably remains some feeling on the bench as well as in the bar that a state constitutional holding is something of a cute trick, if not a bit of nose-thumbing at the federal Supreme Court, and not ‘real’ constitutional law at all.”).

⁷ Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 732 (1991) (“Furthermore, state judges experience a sense of chutzpah in expressing disagreement with the United States Supreme Court.”).

⁸ State v. Miller, 630 A.2d 1315, 1328 (Conn. 1993) (Callahan, A.J., concurring in part and dissenting in part).

⁹ State v. Sullivan, 532 U.S. 769, 772 (2001). See generally Robert F. Williams, *The New Judicial Federalism Takes Root in Arkansas*, 58 ARK. L. REV. 883, 886-87 (2006).

¹⁰ Robert F. Williams, *The Third Stage of The New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211 (2003) [hereinafter Williams, *Third Stage*]. See also Randall T. Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U. L. REV. 421 (1996); G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS: J. FEDERALISM 63 (Spring 1994); Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996).

¹¹ See Williams, *Third Stage*, *supra* note 10, at 211 n.4, for a list of articles on state constitutional law by state judges.

they could reach results different from those reached by the United States Supreme Court, or at least consider doing so. Early on, this possibility was recognized to provide the opportunity to “evade” more limited holdings of the United States Supreme Court under the Federal Constitution.¹² Then, Justice William J. Brennan, Jr., in his now-famous *Harvard Law Review* article about state constitutional law, used a New Jersey search and seizure case as one of his primary examples.¹³ Justice Brennan later noted that the NJF was “probably the most important development in constitutional jurisprudence of our times.”¹⁴ Scholarship prior to Justice Brennan’s had also pointed to search and seizure as an important element of the NJF.¹⁵

It is understandable that criminal procedure cases, after the post-incorporation Warren Court years, formed the bulk of the early cases on the New Judicial Federalism. As Jennifer Friesen observed some time ago, criminal procedure “cases applying state constitutions are plentiful, in large part because attorneys are paid to file and brief them.”¹⁶ She also noted that criminal proce-

¹² Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). See also Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 873 n.2 (1975).

¹³ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 499 (1977). Justice Brennan’s article, although published only in 1977, is among the “most frequently cited law review articles of modern times.” Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge Who Believes in State’s Rights*, 20 J. MARSHALL L. REV. 1, 2 n.3 (1986). Justice Stewart G. Pollock of the New Jersey Supreme Court referred to Justice Brennan’s article as the “Magna Carta of state constitutional law.” Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

¹⁴ G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 165 (1998) (quoting William J. Brennan, Jr., NAT’L L.J., Sept. 29, 1986, at S1); accord William J. Brennan, Jr., *Foreword, Remarks of William J. Brennan, Jr.*, 13 VT. L. REV. 11, 11 (1988) (calling the movement “the most significant development in American constitutional jurisprudence today”).

¹⁵ See, e.g., Robert Force, *State “Bills of Rights”: A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 139, 147-150, 170 (1969); *Project Report*, *supra* note 3, at 322.

¹⁶ Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1270 (1985). See also Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1148-49 (1985) (“The sheer number of state criminal cases and the relation between the protection offered by state and federal constitutions means that the state courts have many opportunities to rule on both federal and state constitutional issues. Thus, state criminal cases provide a rich source of material to study vertical and horizontal federalism.” (footnotes omitted)); Ken Gormley, *State Constitutions and Criminal Procedure: A Primer for the 21st Century*,

dures cases were of a "higher visibility and drama" than civil cases.¹⁷ Lawyers are already in court defending criminal charges, so search and seizure arguments are easier to make. Also, often the outcome of a search and seizure argument will dictate the disposition of the entire case and, as then Justice Shirley Abrahamson pointed out, criminal law is of special *state* concern:

Criminal law is an area of traditional concern for state judges. It is an area of law in which state judges have special experience and expertise. The very bulk of the criminal cases in the state trial court may justify a state's attempt to formulate rules to achieve stability of state law, relatively free of the changes wrought by the United States Supreme Court, and to achieve uniformity within the state judicial system. Because of the state supreme courts' supervisory power over trial courts and procedural rules, it may be easier to develop independence in criminal procedural law than in other areas of constitutional law.¹⁸

State constitutional search and seizure provisions, however, are not all alike. Former Oregon Supreme Court Justice Hans A. Linde has made the point that state constitutions are not "common law."¹⁹ Although state constitutions do contain unique textual differences, the search and seizure provisions are remarkably similar.²⁰

In 1991, Dr. Barry Latzer observed:

67 OR. L. REV. 689, 695 (1988) ("Perhaps the greatest and most immediate impact of state constitutional law has been in the area of criminal law and procedure.").

¹⁷ Friesen, *supra* note 16, at 1270.

¹⁸ Abrahamson, *supra* note 16, at 1150.

¹⁹ Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 229 (1992).

²⁰ See Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007); 2 JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* § 11.02 (4th ed. 2006); BARRY LATZER, *STATE CONSTITUTIONAL CRIMINAL LAW* chs. 2-3 (1995) [hereinafter LATZER, *Criminal Law*]; BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 193-95 (1991) [hereinafter LATZER, *Criminal Justice*]. See, e.g., *State v. Morse*, 123 P.3d 832, 837 (Wash. 2005) (state constitution does not use "reasonable"); *Bouch v. State*, 143 P.3d 643, 648 (Wyo. 2006) (state constitution requires affidavit); *State v. Walker*, 953 So. 2d 786, 789 (La. 2007) (state constitutional text includes automatic standing). But see *State v. Davis*, 929 A.2d 278, 295-96 (Conn. 2007) (reading state constitutional *possessions* the same as Fourth Amendment's "effects").

The Supreme Court's Fourth Amendment rulings have been so numerous and so controversial that they have served as virtual lightning rods for state court divergence. The criminal law field in general and the fact-specific Fourth Amendment cases in particular would seem to be natural targets for state judges. . . .

Yet examined overall, the state constitutional search and seizure decisions have not developed new and independent approaches to the law. Despite considerable rejection of Supreme Court results, there has been little in the way of independent search and seizure doctrine. Nor have the states completely rejected the work of the Supreme Court. . . .

In a sense, the very existence of such a substantial body of state constitutional search and seizure decisions is a referendum on the work of the Burger-Rehnquist Court. However, if the votes are counted—if we are to actually count adoptions and rejections—then Burger and Rehnquist are winning; more cases accept than reject their rulings. . . . In short, the New Federalism is marked by a *selective* revolt against certain portions of search and seizure law.²¹

Even if he was right, and this trend has continued, the area of search and seizure still constitutes probably the single most important area of state constitutional law and will likely continue that way.

In this article, I propose to make a selective case study of search and seizure cases in the period of the New Judicial Federalism, not from the point of view of the *substance*, outcomes, or merits of such decisions, which have been adequately covered elsewhere,²² but rather to assess the *methodologies* engaged in by state courts in this area. It will not present an exhaustive catalog of cases but instead will present cases illustrating these methodo-

²¹ LATZER, *Criminal Justice*, *supra* note 20, at 73-74; *see generally* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 76 (1992). Thus, state constitutional search and seizure doctrine could be referred to as "intermittent." *See generally* Justin Long, *Intermittent State Constitutionalism*, 34 PEPPERDINE L. REV. 41 (2006).

²² FRIESEN, *supra* note 20, at ch. 11; LATZER, *Criminal Justice*, *supra* note 20, at 31-88; Gormley, *supra* note 16, at 702-20; *Special Project: The Continuing Evolution of Criminal Constitutional Law in State Courts*, 47 VAND. L. REV. 795 (1994) [hereinafter *Special Project*]. For example, the *Rutgers Law Journal Annual Issues on State Constitutional Law* have included coverage of state constitutional search and seizure decisions since 1989.

logical points. These approaches, in turn, reflect more generally the methodologies of the NJF.

Actually, there is a strikingly wide range of judicial approaches to the interpretation and application of state constitutional search and seizure guarantees. The many approaches to methodology respond to the central jurisprudential question of the New Judicial Federalism. Dr. Alan Tarr has noted that, in contrast to the great question in federal constitutional law about the legitimacy of judicial review itself, the central question in state constitutional law concerns the legitimacy of state constitutional rulings that diverge from, or go beyond, federal constitutional standards.²³ Is this form of state court "jurisdictional redundancy," to use Robert Cover's term, a good thing?²⁴ Is it legitimate? These questions also arise with respect to other state constitutional rights cases.

The United States Supreme Court renders two different kinds of decisions on federal constitutional law, including search and seizure issues. Decisions *favoring* asserted federal constitutional rights are the supreme law of the land and must be followed everywhere in the United States.²⁵ Decisions *rejecting* claims of federal constitutional rights, by contrast, do not end the matter but rather leave the question, quite literally, to the fifty states for their own decisions.²⁶ These latter kinds of Supreme Court decisions mark the *middle* of an evolving process of constitutional decision-making in our federal system. The continuing state litigation following Supreme Court decisions rejecting federal rights reflects the new paradigm of the NJF in cases concerning search and seizure. Such Supreme Court decisions trigger a series of "second looks" at the question by state decision-makers, most often the courts, based on state legal and policy arguments.²⁷ During this second stage, the Supreme Court deci-

²³ TARR, *supra* note 14, at 174-75.

²⁴ Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interests, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 639 (1981).

²⁵ Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 165 (1986) [hereinafter Williams, *Methodology*].

²⁶ *Id.* at 165-66.

²⁷ Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 361 (1984) [hereinafter Williams, *Shadow*].

sion, while certainly not controlling, continues to play an integral role in the resultant state legislative, executive, and judicial decisions.

The search and seizure doctrines of the New Judicial Federalism continue to evolve, both in the legal literature and in the courts. Despite the warning in 1983 by Justice Robert Jones of Oregon, in a search and seizure case, that any "lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution . . . should be guilty of legal malpractice,"²⁸ many lawyers continue to litigate such cases without adequately raising or briefing state constitutional arguments.²⁹

Neither the threat of a malpractice judgment nor a possible finding of ineffective assistance of counsel, of course, is the primary reason to study state constitutional law in criminal procedure. These threats do, however, serve as a kind of "bottom line" warning or signal to criminal lawyers. Competent, zealous, and effective representation, rather, on the part of both the prosecution and defense, is the goal of the legal profession in the criminal justice system. Law schools, therefore, have an important role to play by including the study of *state constitutional* criminal procedure in the curriculum.³⁰

Like the broader area of American constitutional law, which has included an almost exclusive focus on *federal* constitutional law, the field of criminal procedure (actually a subcategory of constitutional law) has been dominated by federal constitutional law at the expense of its *state* counterpart. It is long past time for this imbalance to change and for legal education to catch up with the real world of criminal justice litigation.

²⁸ *State v. Lowry*, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., specially concurring). See also *Commonwealth v. Kilgore*, 719 A.2d 754, 756-57 (Pa. Super. Ct. 1998). Justice Brennan stated, "I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions." Brennan, *supra* note 13, at 502.

²⁹ See, e.g., *State v. Dean*, 76 P.3d 429, 432 n.1 (Ariz. 2003); *Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005); *State v. Holzer*, 656 N.W.2d 686, 690-91 (N.D. 2003); *Custer v. State*, 135 P.3d 620, 623-24 (Wyo. 2006).

³⁰ Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEGAL ED. 243 (1991).

II. METHODOLOGY ISSUES

A. Evaluating Supreme Court Opinions on Similar or Identical Federal Constitutional Claims

In the area of search and seizure, often when a new question under the state constitutional provision comes to a state court there has already been a determination on the matter at the federal level by the United States Supreme Court. Of course, where the Supreme Court has ruled in favor of the rights claimant that ends the matter for federal constitutional law. Where, however, the Supreme Court has ruled against the Fourth Amendment claim, the matter is left to the states under their own state constitutions or subconstitutional legal material. The "shadow"³¹ or "glare"³² of these United States Supreme Court decisions can cast a powerful influence over the ensuing state constitutional litigation. On a number of occasions, as illustrated by the introductory quote to this article,³³ the Supreme Court majority reminds readers of its opinion rejecting the *Federal* Fourth Amendment claim that states may reach a different result under their *state* constitutions.

In *California v. Greenwood*,³⁴ the United States Supreme Court held six to three that the Fourth Amendment does not prohibit police from seizing and searching garbage which has been left out for collection. Interestingly, the Supreme Court *majority* reminded us that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."³⁵ The Court, as noted above, is expressing a truism, but truisms can be useful in reminding state courts and the lawyers who practice before them that they may argue for, and interpret their state constitutions to

³¹ Williams, *Shadow*, *supra* note 27, at 353.

³² Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1015 (1997) [hereinafter Williams, *Glare*].

³³ See *supra* note 1 and accompanying text.

³⁴ 486 U.S. 35 (1988).

³⁵ *Id.* at 43; see also *Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.").

be more protective than the Federal Constitution. In addition, however, examination of the Supreme Court majority decision rejecting a Fourth Amendment claim can also be very instructive with respect to the "second look" at the matter under a state constitution. For example, there are a number of instances of "underenforcement" of federal constitutional norms against the states because of the Supreme Court's concerns about federalism, and the difficulties of crafting detailed constitutional rules of criminal procedure for all fifty states.³⁶

This point was clearly recognized by the New Jersey Supreme Court when it found that there was state constitutional protection from searches and seizures of curbside garbage.³⁷ Justice Robert Clifford acknowledged the textual similarity between the federal and state search and seizure provisions.³⁸ He then noted that the United States Supreme Court may be "hesitant to impose on a national level far-reaching constitutional rules binding on each and every state."³⁹ Justice Clifford continued by explaining that the Supreme Court must be especially cautious in Fourth Amendment cases.

When determining whether a search warrant is necessary in a specific circumstance, the Court must take note of the disparity in warrant-application procedures among the several states, and must consider whether a warrant requirement in that situation might overload the procedure in any one state. In contrast, we are fortunate to have in New Jersey a procedure that allows for the speedy and reliable issuance of search warrants based on probable cause. A warrant requirement is not so great a burden in New Jersey as it might be in other states.⁴⁰

Justice Clifford was recognizing not only the possibility of Supreme Court deference to the states based on federalism concerns, but also the possibility of different "strategic concerns" at the state level.

³⁶ Williams, *Shadow*, *supra* note 27, at 389-97; Williams, *Glare*, *supra* note 32, at 1046-55.

³⁷ State v. Hempele, 576 A.2d 793, 800 (N.J.).

³⁸ *Id.*

³⁹ *Id.* (quoting State v. Hunt, 450 A.2d 952, 962 (N.J. 1982) (Pashman, J., concurring)).

⁴⁰ *Id.* at 800-01 (citation omitted).

Professor Lawrence Sager identified the possibility of state and federal courts employing different “strategies” in constitutional interpretation. State courts, interpreting their own constitutions, may see the need to employ different strategies, even though they are applying similar “norms of political morality.” Sager concluded:

State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges’ instrumental impulses and judgments differ.

....

In light of the substantial strategic element in the composition of constitutional rules, the sensitivity of strategic concerns to variations in the political and social climate, the differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed.⁴¹

Professor Neil McCabe has characterized the garbage search cases as also reflecting differences of opinion among federal and state courts about “legislative or social facts”—whether society views as reasonable a person’s expectation of privacy in his garbage.⁴² Obviously, state courts, interpreting their own state constitutions, have no federalism concerns; as a result, state courts may adopt different strategies to protect constitutional rights, and may make findings on such legislative or social facts that differ from a federal court’s findings under the Federal Constitution.

⁴¹ Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 975-76 (1985).

⁴² Neil Coleman McCabe, *Legislative Facts as Evidence in State Constitutional Search Analysis*, 65 TEMP. L. REV. 1229, 1245-51 (1992) (perceptively discussing the Supreme Court’s decision in *Greenwood* and its approach to “legislative or social facts”—whether an expectation of privacy in one’s garbage is one that society would recognize as reasonable—in the context of state constitutional law).

It is also very important to examine the dissenting opinions in such United States Supreme Court cases. For example, the Michigan Supreme Court, in *People v. Beavers*,⁴³ rejected the United States Supreme Court's decision in *United States v. White*,⁴⁴ which held evidence of a taped conversation did not have to be suppressed where one party to the conversation permits the police to monitor it.⁴⁵ The Michigan Supreme Court relied in part on Justice Harlan's dissent in *White*.⁴⁶ I commented on the phenomenon in a previous article, stating:

Supreme Court dissents can and do have a significant impact upon state courts confronting the same constitutional problem the dissenter believes the Court decided incorrectly. In this sense, state courts have become a new audience for Supreme Court dissents on federal constitutional questions that may also arise under state constitutions. Thus, dissenters may be vindicated more quickly, but only on a state-by-state basis.⁴⁷

B. Adequate and Independent State Grounds

State court decisions are final, and the United States Supreme Court has no jurisdiction to review them, where they are based on adequate and independent state law ground.⁴⁸ As the NJF has matured, the adequate and independent state ground doctrine has become a criminal defendant's argument, used to shield protective state constitutional judgments from a prosecutor's petition for United States Supreme Court review.⁴⁹ Prior to the NJF, the doctrine was most often used as a prosecutor's argument, used to shield state criminal procedure judgments (ar-

⁴³ 227 N.W.2d 511, *cert. denied*, 423 U.S. 878 (1975).

⁴⁴ 401 U.S. 745 (1971) (plurality opinion).

⁴⁵ *Id.* at 745.

⁴⁶ *Beavers*, 227 N.W.2d at 514-15; *see also* State v. Novembrino, 519 A.2d 820, 848-49 (N.J. 1987); State v. Alston, 440 A.2d 1311, 1319 (N.J. 1981).

⁴⁷ Williams, *Shadow*, *supra* note 27, at 375-76 (footnote omitted); *see also* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1985-1986).

⁴⁸ *See, e.g.*, FRIESEN, *supra* note 20, at § 1.07; LATZER, *Criminal Justice*, *supra* note 20, at 11-30; Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985).

⁴⁹ Robert C. Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819 (1983).

guably below federal constitutional standards) from defendants' petitions for United States Supreme Court review.⁵⁰

Because of the dominance of Federal Fourth Amendment doctrine on the area of search and seizure law, it is not surprising that state courts often write opinions mixing state and federal doctrine in a way that makes it difficult, where United States Supreme Court review is sought, to tell if the state decision is based on an adequate and independent state ground. This situation had caused the United States Supreme Court a great deal of difficulty and, in a 1983 search and seizure case, the Court sought to resolve the problem.

In *Michigan v. Long*,⁵¹ Justice O'Connor announced:

Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.⁵²

This approach, although criticized by Justice Stevens,⁵³ and later by Justice Ginsburg,⁵⁴ provided guidance for state courts to en-

⁵⁰ See, e.g., *Williams v. State*, 82 S.E.2d 217 (Ga. 1954), *remanded*, *Williams v. Georgia*, 349 U.S. 375 (1955), *on remand Williams v. State*, 88 S.E.2d 376 (Ga. 1955), *cert. denied*, 350 U.S. 950 (1956); Walter Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1021 (1959).

⁵¹ 463 U.S. 1032 (1983). See Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985).

⁵² *Long*, 463 U.S. at 1040-41 (emphasis added). See Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5-9 (1984-85).

⁵³ *Long*, 463 U.S. at 1065-72 (Stevens, J., dissenting).

sure their search and seizure and other state constitutional law rulings were final. Oddly enough, many state constitutional decisions since *Michigan v. Long* have not utilized the simple "plain statement."⁵⁵ Dr. Barry Latzer has provided a possible explanation for this phenomenon:

[L]aw-ambiguity may be viewed as a mark of caution: perhaps the failure to "commit" state law to a position is a way of preserving future interpretive options, so that the court could someday say that the previous case was not construing the state constitution after all. In any event, one point is clear beyond question: state constitutional law is not just about broadening rights that the Supreme Court has narrowed.⁵⁶

The famous case of *State v. von Bulow*,⁵⁷ portrayed in the movie *Reversal of Fortune*, involved the Rhode Island state constitutional search and seizure clause. After the suspicious death of Claus von Bulow's wife, an admittedly *private* search by the maid, family members and their attorney, without any govern-

⁵⁴ *Arizona v. Evans*, 514 U.S. 1, 24, 30-32 (1995) (Ginsburg, J., dissenting).

⁵⁵ A survey of over 500 decisions, from all fifty states, between the 1983 *Michigan v. Long* decision and the beginning of 1988, concluded that "few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions." Felicia A. Rosenfeld, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1068 (1988). See Mathew G. Simon, Note, *Revisiting Michigan v. Long After Twenty Years*, 66 ALB. L. REV. 969, 970 (2003), for a similar conclusion many years later. See also Donna M. Nakagiri, Comment, *Developing State Constitutional Jurisprudence After Michigan v. Long: Suggestions for Opinion Writing and Systemic Change*, 1998 MICH. ST. U. L. REV. 807 (1998).

⁵⁶ Barry Latzer, *Into the '90s: More Evidence that the Revolution Has a Conservative Underbelly*, 4 EMERGING ISSUES ST. CONST. L. 17, 31-32 (1991). By contrast, Ann Althouse has argued that the *Michigan v. Long* "plain statement" requirement eliminates "law ambiguity" as a choice for state judges:

State judges who want to expand the rights of an unpopular group, such as the criminally accused, may not want to call attention to their independence and thereby make themselves targets for political retaliation. By obscuring the source of the expanded rights they announce, state judges may create the impression that they act under the coercion of federal law and thus deflect voter wrath . . . Justice O'Connor's presumption forces state judges to endure one form of scrutiny or [possible United States Supreme Court review] and deprives them of the ability to immunize themselves with ambiguity.

Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 988-89 (1993) (footnote omitted).

⁵⁷ 475 A.2d 995 (R.I. 1984), *cert. denied*, 469 U.S. 875 (1984).

mental authority, discovered prescription drugs.⁵⁸ These were turned over to law enforcement officials who, without obtaining a warrant, tested the drugs and continued the investigation.⁵⁹ The Rhode Island Supreme Court excluded the evidence because the state's "expansion" of the private search was unconstitutional.⁶⁰

The court reversed von Bulow's conviction on several grounds including search and seizure.⁶¹ Justice Florence K. Murray's opinion for the court analyzed both federal and state constitutional law. After ruling that federal constitutional guarantees had been violated, Justice Murray turned to the state charter, and explained:

Article I, sec. 6, of the Rhode Island Constitution is an alternative, independent foundation upon which we rest our holding that the toxicological testing was an illegal search. That section constitutes "bona fide separate, adequate, and independent grounds," upon which we base our decision to suppress the admission of evidence procured by the state's toxicological analysis.⁶²

The Rhode Island Attorney General's petition to the United States Supreme Court for certiorari was denied without comment.⁶³ The next year, United States Supreme Court Justice John Paul Stevens cited the petition for certiorari in *von Bulow* as an example of "state legal officers [filing] petitions for certiorari in even the most frivolous search and seizure cases."⁶⁴

⁵⁸ *Id.* at 999.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1012-20; see also *infra* notes 156-60 and accompanying text; *State v. Saez*, 653 A.2d 1130 (N.J. 1994); see generally Robert F. Williams, *The Claus von Bulow Case: Chutzpah and State Constitutional Law?*, 26 CONN. L. REV. 711 (1994).

⁶¹ *von Bulow*, 475 A.2d at 1012-20.

⁶² *Id.* at 1019 (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)) (citation omitted). The *von Bulow* opinion has been described as an example of the type of plain statement required by *Michigan v. Long*. See Pollock, *supra* note 48, at 981 n.22, 992.

⁶³ *Rhode Island v. von Bulow*, 469 U.S. 875 (1984). Interestingly, a student survey of cases found this was the only Rhode Island Supreme Court *explicit* plain statement referring to *Michigan v. Long* between the time *Long* was decided, in 1983, and January 1988. See Rosenfeld, *supra* note 55, 1051 n.64, 1071. See also *id.* at 1054 n.83, 1074 (noting two other less explicit Rhode Island plain statements).

⁶⁴ *California v. Carney*, 471 U.S. 386, 396 (1985) (Stevens, J., dissenting). See also *id.* at 396 n.4 (referring to *von Bulow* as "explicitly based on independent state grounds").

C. Sequence of Judicial Analysis

As the NJF has developed, considerable attention has been devoted to the question of sequence, or order, in which state courts should evaluate state constitutional claims that are presented together with similar or identical federal constitutional claims. Although I have maintained that "it is not the *sequence* that matters, but rather the focus on truly *independent* state constitutional interpretation, in whatever sequence it occurs," this is still a question that merits serious attorney and judicial consideration.⁶⁵

1. Primacy or "First-Things-First"

Hans A. Linde, while still a professor at the University of Oregon School of Law, made the important point that state constitutional claims should be evaluated by the courts *before* reaching claims under the Federal Constitution. He contended:

Judicial review of official action under the state constitution thus is logically prior to review of the effect of the state's total action (including rejection of the state constitutional claim) under the fourteenth amendment. *Claims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection.*⁶⁶

Later, as a Justice of the Supreme Court of Oregon, Linde reiterated the point:

The history of this case demonstrates the practical importance of the rule, often repeated in recent decisions, that all questions of state law be considered and disposed of before reaching a

⁶⁵ Williams, *Glare*, *supra* note 32, at 1019 (citing Williams, *Methodology*, *supra* note 25, at 172-73). See also Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 639 n.11 (1994).

⁶⁶ Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970). See Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984), and Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980), and Hans A. Linde, Book Review, 52 OR. L. REV. 325, 332-41 (1973), for other expressions of this point of view.

claim that this state's law falls short of a standard imposed by the federal constitution on all states.⁶⁷

Interestingly, this approach also contemplates consideration of *subconstitutional* state law claims even prior to the state constitutional law analysis. This point has been made clear by the Oregon court:

By now, the appropriate method of resolving properly raised issues of criminal procedure in Oregon should be axiomatic. All issues should first be addressed on a subconstitutional level. Courts then should consider any remaining issues under the Oregon Constitution. Finally, if no state law, including the state constitution, resolves the issues, courts then should turn for assistance to the Constitution of the United States.⁶⁸

Following this primacy approach would, most likely, lead state courts to be clearer about whether they intend their decisions to rest on adequate and independent state grounds. This point has led Justice John Paul Stevens to advocate the use of the primacy approach by state courts.⁶⁹

The Supreme Court of New Hampshire has been the most consistent court in applying the primacy approach. Since its influential 1983 decision in a search and seizure case, *State v. Ball*,⁷⁰ this court has consistently applied the primacy approach.⁷¹ Justice Stevens noted the New Hampshire methodology:

Since 1983, in over a dozen cases, the New Hampshire Supreme Court has thereby averted unnecessary disquisitions on the meaning of the Federal Constitution.

⁶⁷ *State v. Kennedy*, 666 P.2d 1316, 1318 (Or. 1983). See also FRIESEN, *supra* note 20, at ch. 1 (surveying states).

⁶⁸ *State v. Tompkin*, 143 P.3d 530, 534 (Or. 2006); *State v. Moylett*, 836 P.2d 1329, 1332 (Or. 1992). See also *infra* Part II.K (discussing subconstitutional search and seizure protections).

⁶⁹ *Delaware v. Van Arsdall*, 475 U.S. 673, 698-708 (1986) (Stevens, J., dissenting); *Massachusetts v. Upton*, 466 U.S. 727, 736 (1984) (Stevens, J., concurring). See generally Ronald K. L. Collins, *Justice Stevens Becomes Advocate of States' Role in High Court*, NAT'L L.J., August 27, 1984, at 20.

⁷⁰ 471 A.2d 347, 350 (N.H. 1983).

⁷¹ Robert F. Williams, *New Hampshire and the Methodology of the New Judicial Federalism*, 45 N.H.B.J. 6 (Summer 2004), available at <http://www.nhbar.org/publications/archives/display-journal-issue.asp?id=18>.

The emerging preference for state constitutional bases of decision in lieu of federal ones, in my view, the analytical approach best suited to facilitating independent role of state constitutions and state courts in our federal system.⁷²

New Hampshire has followed this method consistently to the present, including its 2003 decision requiring a warrant for the search and seizure of curbside garbage.⁷³

Despite this support for the primacy approach, joined by scholars,⁷⁴ it has not been embraced consistently by very many state courts.⁷⁵

2. The Supplemental or Interstitial Approach

A number of states follow a methodology that is the exact opposite of the primacy approach: the supplemental or interstitial approach. Here, the federal constitutional claim is examined first, and if the rights claimant prevails, the decision is based on the Federal Constitution and is subject to United States Supreme Court review. In the event that the federal claim fails, however, the state court proceeds to evaluate the state constitutional claim to determine whether it will recognize rights beyond the federal doctrine. When they do recognize rights beyond the national minimum it can seem result oriented. It is, therefore, the use of this approach which is most likely to stimulate the state court to search for criteria or factors to *justify* a divergence from federal constitutional doctrine.⁷⁶ Therefore, virtually all states that subscribe to the criteria or factor approach tend to apply the supplemental or interstitial methodology.

Actually, this method should not be surprising given the prior domination of federal constitutional law in areas such as search and seizure. In some sense, the conditioned response of

⁷² *Van Arsdall*, 475 U.S. at 704 (1986) (Stevens, J., dissenting) (footnote omitted).

⁷³ *State v. Goss*, 834 A.2d 316 (N.H. 2003).

⁷⁴ FRIESEN, *supra* note 20, at ch. 1.

⁷⁵ Rachel E. Fugate, *The Florida Constitution: Still Champion of Citizens' Rights?*, 25 FLA. ST. U. L. REV. 87, 102-09 (1997); Daniel Gordon, *Good Intentions—Questionable Results: Florida Tries the Primacy Model*, 18 NOVA L. REV. 759 (1994); John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law: Why Don't the "Primacy" States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 (1993).

⁷⁶ See *infra* Part II.D.

lawyers and judges is to look at the Federal Constitution first. Justice Stewart Pollock of the New Jersey Supreme Court explained the rationale of this approach: "One reason for following the supplemental model is that federal constitutional rights . . . establish our national identity. In an increasingly mobile nation, each of us can take comfort in knowing that, throughout the United States, the federal constitution protects a core of basic liberties."⁷⁷ In 1997, the Supreme Court of New Mexico specifically adopted the interstitial approach:

[W]hen federal protections are extensive and well-articulated, state court decisionmaking that eschews consideration of, or reliance on, federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide, particularly when parallel federal issues have been exhaustively discussed by the United States Supreme Court and commentators.⁷⁸

Unlike many courts which utilize the interstitial approach, however, the *Gomez* court specifically rejected use of the "criteria approach":

We decline to follow those states that require litigants to address in the trial court specified criteria for departing from federal interpretation of the federal counterpart. However, we note that several state courts have outlined a number of criteria that trial counsel in New Mexico might profitably consult in framing state constitutional arguments.⁷⁹

3. The Dual Sovereignty Approach

Justice Robert Utter of the Supreme Court of Washington has advocated the dual sovereignty approach.⁸⁰ Justice Utter correctly noted that, in fact, many state courts made it a regular

⁷⁷ Pollock, *supra* note 48, at 986. See also FRIESEN, *supra* note 20, at § 1.06 [3].

⁷⁸ *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997) (quoting *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982)).

⁷⁹ *Id.* at 8 n.3; see also *infra* Part II.D.

⁸⁰ Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Cases When Disposing of Issues on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

practice to rule on both state and federal constitutional grounds.⁸¹ This technique of analyzing constitutional claims based on both constitutions, of course, is what led to the problems in identifying decisions that were based on adequate and independent state grounds.⁸² Justice Utter recognized this problem, and advocated a clear distinction in state court opinions between federal and state constitutional law.⁸³ Acknowledging that if the rights claimant prevailed on the state constitutional claim, any discussion of federal constitutional law would be dictum, Justice Utter contended that:

Failure to continue to engage in the federal debate can only weaken the values that underlie our federal system. To engage in the debate can only broaden our understanding of the federal constitution. The result will be a healthy, living document, nourished by the court systems of all fifty states.⁸⁴

The point here is that state courts (and the lawyers who present cases to them) should be cognizant of the sequence in which they approach federal and state constitutional arguments. These methodology questions may serve to highlight other issues in the interpretation of state constitutional rights guarantees.

D. The Criteria or Factor Approach

An example of the criteria approach is New Jersey Justice Alan Handler's concurring opinion in *State v. Hunt*.⁸⁵ In *Hunt*, the New Jersey Supreme Court found a defendant's telephone billing records to be protected from a warrantless seizure under the state constitution,⁸⁶ rejecting a contrary United States Supreme Court opinion, *Smith v. Maryland*,⁸⁷ which held the warrantless seizure of a pen register listing of numbers dialed was

⁸¹ *Id.* at 1049; see also FRIESEN, *supra* note 20, at § 1.04 [4].

⁸² See *supra* notes 48-64 and accompanying text.

⁸³ Utter, *supra* note 80, at 1050.

⁸⁴ *Id.* See Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635 (1987), for a later version of Justice Utter's views. Additionally, see *State v. Hayes*, 188 S.W.3d 505, 513 (Tenn. 2006), for a Tennessee search and seizure case performing dual analysis.

⁸⁵ 450 A.2d 952 (N.J. 1982).

⁸⁶ *Id.* at 952.

⁸⁷ 442 U.S. 735 (1979).

permitted.⁸⁸ Justice Handler's concurring opinion in *Hunt* appeared to consider the state constitution as a secondary source of rights to which state courts may "resort" under certain circumstances. He cautioned: "There is a danger, however, in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere. The erosion or dilution of constitutional doctrine may be the eventual result of such an expedient approach."⁸⁹ He added: "It is therefore appropriate, in my estimation, to identify and explain *standards or criteria* for determining when to invoke our State Constitution as an independent source for protecting individual rights."⁹⁰

Justice Handler identified seven criteria or factors that might justify a result different from the United States Supreme Court's: (1) textual differences in the constitutions; (2) "legislative history" of the provision indicating a broader meaning than the federal provision; (3) state law predating the United States Supreme Court decision; (4) differences in federal and state structure; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state.⁹¹ He concluded that reliance on such criteria demonstrates that a divergent state constitutional interpretation "does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."⁹²

Justice Handler denied his analysis created a presumption in favor of federal doctrine,⁹³ but Justice Pashman in a separate

⁸⁸ *Id.* at 735.

⁸⁹ *Hunt*, 450 A.2d at 963-64 (Handler, J., concurring). Justice Handler noted the possibility that state court constitutional interpretations could be overruled by state constitutional amendments. *Id.* at 964 n.2.

⁹⁰ *Id.* at 965 (emphasis added).

⁹¹ *Id.* at 965-67.

⁹² *Id.* at 967. See Williams, *Glare*, *supra* note 32, at 1026-46, for a discussion of other states following this approach after *Hunt*.

⁹³ *Hunt*, 450 A.2d at 967 n.3 (Handler, J., concurring). In a law review article, Justice Handler stated: "I wrote separately in *Hunt* to express my view that resort to the state constitution as an independent source for protecting individual rights is most appropriate when supported by sound reasons of state law, policy, or tradition." Alan B. Handler, *Expounding the State Constitution*, 35 RUTGERS L. REV. 202, 204 (1983). See *id.* at 206 n.29; see also *State v. Williams*, 459 A.2d 641, 650 (1983) ("We have not hesitated to recognize and vindicate individual rights under the State Constitution where our own constitutional

concurrence disagreed.⁹⁴ Importantly, Justice Pashman observed that such a presumption can actually serve to limit a state court's authority to interpret its constitution where none of the criteria or factors can be identified.⁹⁵ This is often the case in search and seizure situations.

These kinds of criteria, factors, and standards do, in fact, reflect circumstances under which state courts have interpreted their constitutions to provide more extensive rights than their federal counterpart.⁹⁶ They are important arguments for scholars, courts, and advocates.⁹⁷ They should not, however, serve as *limitations on* state court authority to disagree with United States Supreme Court constitutional analysis even if none of the factors are present. A state high court has the duty, in interpreting the supreme law of the state, to adopt a reasoned interpretation of its own constitution despite what the United States Supreme Court has said when interpreting a different constitution under different institutional circumstances.⁹⁸

history, legal traditions, strong public policy and special state concerns warrant such action.”).

⁹⁴ *Hunt*, 450 A.2d at 960 n.1, 962 (Pashman, J., concurring). On the question of the presumptive correctness of federal constitutional decisions for state constitutional law compare Honorable Daniel J. O'Hern, *The New Jersey Constitution: A Charter to Be Cherished*, 7 SETON HALL CONST. L.J. 827 (1997) (urging state courts not to diverge from United States Supreme Court rulings), with Robert F. Williams, *Two Visions of State Constitutional Rights Protections*, 7 SETON HALL CONST. L.J. 833 (1997) (urging independent consideration of state constitutional claims).

⁹⁵ *Hunt*, 450 A.2d at 960 (Pashman, J., concurring) (“Although the factors listed [by Justice Handler] are potentially broad, they impose clear limits.”).

⁹⁶ See, e.g., A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 934-44 (1976); Kent M. Williams, Note, *Property Rights Protection Under Article I, Section 10 of the Minnesota Constitution: A Rationale for Providing Possessory Crimes Defendants with Automatic Standing to Challenge Unreasonable Searches and Seizures*, 75 MINN. L. REV. 1255, 1273-1300 (1991).

⁹⁷ See Hugh D. Spitzer, *New Life for the “Criteria Tests” in State Constitutional Jurisprudence: “Gunwall is Dead—Long Live Gunwall!”*, 37 RUTGERS L.J. 1169 (2006), for an important analysis of the criteria approach as a blueprint for argument and analysis. See also William F. Cook, *The New Jersey Bill of Rights and a “Similarity Factors” Analysis*, 34 RUTGERS L.J. 1125, 1127 (2003) (arguing for the requirement of criteria to justify following United States Supreme Court interpretations of the Federal Constitution based on a presumption of “state constitutional distinctness”).

⁹⁸ See *Holder v. State* 847 N.E.2d 930, 935 (Ind. 2006); *State v. Anderson*, 733 N.W.2d 128, 140 (Minn. 2007); *State v. Burbach*, 706 N.W.2d 484, 489 (Minn. 2005); *Commonwealth v. DeJohn* 403 A.2d 1283, 1289 (Pa. 1979) (“As we believe that *Miller* establishes a dangerous precedent, with great potential for abuse, we decline to follow that case when construing the state constitutional protection against unreasonable searches and sei-

Wisconsin Chief Justice Shirley Abrahamson, in discussing the garbage search cases,⁹⁹ directly addressed the matter of disagreement between state judges and the United States Supreme Court:

But should not different opinions about individual rights in search and seizure cases be expected and accepted? . . .

Differences in interpretation of the state and federal constitutions should be viewed, I believe, as examples of the difficulties of interpreting language, especially the broad phrases of a bill of rights. . . .

We accept division of opinion within the United States Supreme Court on interpretations of constitutional language. . . . Why should state courts not closely examine a federal decision to determine whether it is sufficiently persuasive to warrant adoption into state law?¹⁰⁰

These views recognize the legitimacy of a reasoned difference of opinion, not as a “mere” result-oriented disagreement, but rather as the product of honestly held alternative ways of looking at a problem of constitutional interpretation under state constitutions and the consequences of resolving it in a certain way. This attitude has to include rejection of the criteria approach. Former

zures.”). See also Honorable Dennis J. Braithwaite, *An Analysis of the “Divergence Factors”: A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1 (2001), for an important critique of the New Jersey approach.

⁹⁹ Abrahamson, *supra* note 7, at 725-33.

¹⁰⁰ *Id.* at 731.

Justice Joseph Grodin of California has made a similar point,¹⁰¹ as have others.¹⁰²

In *People v. Scott* and *People v. Keta*,¹⁰³ in 1992, the New York Court of Appeals parted with the United States Supreme Court in rejecting, respectively, the “open fields” doctrine and the “administrative search” exception in search and seizure cases.¹⁰⁴ Judge Joseph Bellacosa, with Judge Richard Simons and Chief Judge Sol Wachtler in agreement, wrote a bitter, accusatorial dissent aimed at both the substance and methodology of the majority opinions.¹⁰⁵

The doctrine that State courts should interpret their own State Constitutions, *where appropriate*, to *supplement* rights

¹⁰¹ Joseph R. Grodin, *Commentary: Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391 (1988). He writes:

The presence of distinctive language or history obviously presents the most comfortable context for relying upon independent state grounds. In the absence of such factors, however, state courts are still obliged to find meaning in the provisions of the state constitutions. And . . . neither logic nor history requires that they accord state constitutional language the same meaning as the United States Supreme Court has accorded a comparable provision of the federal Constitution.

Id. at 400; *see also* Peter Linzer, *Why Bother with State Bills of Rights?*, 68 TEX. L. REV. 1573, 1584-85, 1607-08, 1610 (1990).

¹⁰² *See, e.g.*, G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841 (1991). He writes:

[R]ather than blindly following federal precedent, state judges should independently seek their own best interpretation of their state constitutions. This does not mean that they should altogether ignore federal rulings—they may be adopted or rejected, depending on their inherent persuasiveness. But when state judges forthrightly assert their own perspectives, it is argued, the result is a healthier and more vibrant federalism.

Id. at 849; *see also id.* at 847 n.24, 854-55.

¹⁰³ 593 N.E.2d 1328 (N.Y. 1992). In *People v. Scott* and *People v. Keta*, the New York Court of Appeals consolidated *People v. Scott*, 565 N.Y.S.2d 576 (N.Y. App. Div. 1991), and *People v. Keta*, 567 N.Y.S.2d 738 (N.Y. App. Div. 1991). *Id.* at 1328.

¹⁰⁴ *Scott*, 593 N.E.2d at 1334, 1341-43. *See generally* Luke Bierman, *Horizontal Pressures and Vertical Tensions: State Constitutional Discordancy at The New York Court of Appeals*, 12 TOURO L. REV. 633 (1996); Eve Cary & Mary R. Falk, *People v. Scott & People v. Keta: “Democracy Begins in Conversation”*, 58 BROOK L. REV. 1279 (1993); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals’ Quest for Principled Decisionmaking*, 62 BROOK L. REV. 1, 218 (1996).

¹⁰⁵ *Scott*, 593 N.E.2d at 1348-49 (Bellacosa, J., dissenting) (“Simply stated, the common issue is whether this Court has a justifiable basis, within its recently rearticulated method of noninterpretative analysis, to apply New York’s mirror equivalent of the Fourth Amendment . . . differently from the United States Supreme Court in these cases.”).

guaranteed by the Federal Constitution is not in dispute. Indeed, we have shown our support for that doctrine *where appropriate* with our votes in a long line of cases We do strenuously disagree with the Court, however, that the doctrine is being “cautiously exercised” . . . and believe that the applications of the doctrine here create a sweeping, new and unsettling interpretation—not mere application of settled principles.¹⁰⁶

The majority, according to the dissenters, had simply “superimpose[d] its preferred view of the constitutional universe.”¹⁰⁷

Judge Judith Kaye concurred with the majority opinions to address the methodological issues raised by Judge Bellacosa.¹⁰⁸ Her observations are telling:

The dissent in this case is distinctive only in the tone of its expression, most especially its accusation that the Court’s legal conclusions and analysis are the product of ideology, simply the imposition of a personally preferred view of the constitutional universe. . . .¹⁰⁹

First, however much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments as to whether . . . constitutional protections we have enjoyed in this State have in fact been diluted by subsequent decisions of a more recent Supreme Court. In that no two cases are identical, it is in the nature of our process that in the end a judgment must be made as to the application of existing precedents to new facts. To some extent that has taken place in the two cases before us

Second, I disagree with the dissent that, in an evolving field of constitutional rights, a methodology must stand as an *iron-clad checklist* to be rigidly applied on pain of being accused of lack of principle or lack of adherence to stare decisis. . . . But where we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the

¹⁰⁶ *Id.* at 1356 (second emphasis added) (citations omitted).

¹⁰⁷ *Id.*; see also *id.* at 1348-49.

¹⁰⁸ See *id.* at 1346 (Kaye, J., concurring). See *State v. Canelo*, 653 A.2d 1097 (N.H. 1995), for a similar New Hampshire case involving search and seizure.

¹⁰⁹ *Scott*, 593 N.E.2d at 1346 (Kaye, J., concurring).

State Constitution when we examine whether we should follow along as a matter of State law—wherever that may fall on the checklist.

....

The Supreme Court is not insulted when we do so.¹¹⁰

The Wyoming Supreme Court has been applying the criteria approach in search and seizure cases, emphasizing that the criteria are “non-exclusive,” since 1993.¹¹¹

The criteria approach appears to be a response to criticism of state courts for diverging from, or disagreeing with, United States Supreme Court decisions on identical or similar facts under identical or similar constitutional provisions. These attacks on the legitimacy of independent state constitutional interpretation¹¹² seem, somewhat understandably, to have stimulated the criteria approach. But are state courts not simply doing what they did for all those years before the selective incorporation of the Federal Bill of Rights into the Fourteenth Amendment?

E. State Courts in Lockstep with Federal Search and Seizure Doctrine

As noted earlier,¹¹³ probably a majority of search and seizure claims raised under state constitutions are resolved in accordance with federal search and seizure doctrine. This is, of course, completely acceptable as long as the state courts are aware of the

¹¹⁰ Scott, 593 N.E.2d at 1346 (Kaye, J., *Id.* at 1347 (emphasis added); see Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1192-96 (1994).

¹¹¹ See O'Boyle v. State, 117 P.3d 401, 408-09 (Wyo. 2005) (citing Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993)); see also State v. Davis, 929 A.2d 278, 294-95 (Conn. 2007) (same); Fertig v. State, 146 P.3d 492, 496-97 (Wyo. 2006). The Saldana opinion is a virtual primer on state constitutional law in the context of search and seizure.

¹¹² Williams, *Shadow*, *supra* note 27, at 355-58; see also Williams, *Glare*, *supra* note 32, at 1055-56.

¹¹³ See *supra* note 21 and accompanying text.

state grounds and the possibility of a more protective interpretation, and they take seriously the arguments.¹¹⁴

When a state court adopts federal constitutional search and seizure doctrine and results for the resolution of state constitutional claims, however, it can take several different approaches. First, as noted above, it can decide to follow Fourth Amendment holdings for the case before it, without indicating that in the future, *in other cases*, the same approach will be followed. This latter approach, which I have called “prospective lockstepping,” seems to be an improper attempt to prejudge future cases, which will stifle independent arguments in future search and seizure cases.¹¹⁵ A good example of prospective lockstepping in search and seizure cases is the Ohio Supreme Court’s decision in *State v. Robinette*.¹¹⁶ The court concluded that after incorporation of the Federal Bill of Rights, the “United States Constitution became the primary mechanism to safeguard an individual’s rights.”¹¹⁷ Noting the identical state and federal constitutional texts, and relying on earlier decisions, the Ohio Supreme Court decided to adopt the United States Supreme Court’s view of the Fourth Amendment as the authoritative judicial interpretation of the state constitutional search and seizure clause.¹¹⁸ The court relied specifically on its 1981 decision in *State v. Geraldo*,¹¹⁹ where it stated:

It is our opinion that the reach of Section 14, Article I, of the Ohio Constitution with respect to the warrantless monitoring of a consenting informant’s telephone conversation is coextensive with that of the Fourth Amendment to the United States Constitution. *As a consequence thereof, appellant’s failure to prove a violation of the Fourth Amendment dictates the conclusion that*

¹¹⁴ Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1506-09 (2005) (discussing “reflective adoption”).

¹¹⁵ *Id.*; see also FRIESEN, *supra* note 20, at § 11.06 [2].

¹¹⁶ 685 N.E.2d 762 (Ohio 1997); see also *State v. Scarborough*, 201 S.W.3d 607, 622 (Tenn. 2006).

¹¹⁷ *Robinette*, 685 N.E.2d at 766.

¹¹⁸ *Id.* at 767. See also *id.* at 771 (“Accordingly, we find that Section 14, Article I of the Ohio Constitution affords protections that are coextensive with those provided by the Fourth Amendment . . .”).

¹¹⁹ 429 N.E.2d 141 (Ohio 1981).

*his rights under Section 14, Article I, of the Ohio Constitution have not been violated either.*¹²⁰

The court noted the need for uniformity in this area of criminal procedure, and stated that in the future, absent “persuasive reasons to find otherwise,” it would follow the United States Supreme Court’s interpretations of the Fourth Amendment as a matter of Ohio constitutional law.¹²¹

The Illinois Supreme Court recently engaged in a searching analysis of its “lockstep” approach to search and seizure cases.¹²² It concluded, based on indications it perceived in the history of the adoption of the 1970 Illinois Constitution, that the framers did not intend to protect search and seizure rights beyond federal standards,¹²³ and that it should continue its “limited lockstep” approach,¹²⁴ which recognizes the possibility of divergent opinions if criteria are met.¹²⁵ The Michigan Supreme Court has followed a similar approach, based on a reading of that state’s constitutional history.¹²⁶

F. Federal-State Uniformity in Search and Seizure

In criminal procedure areas, such as search and seizure, it is sometimes said that there is a special justification for “lockstepping” or uniform interpretation where claims under both the

¹²⁰ *Id.* at 146 (emphasis added); see also *State v. Morris*, 72 P.3d 570, 576 (Kan. 2003) (explaining that the state search and seizure provision “provides protection identical to that provided under the Fourth Amendment to the United States Constitution”); *State v. Andrews*, 565 N.E.2d 1271, 1273 n.1 (Ohio 1991) (“A review of Ohio case law indicates that we have interpreted Section 14, Article I of the Ohio Constitution to protect the same interests and in a manner consistent with the Fourth Amendment to the United States Constitution.”); *State v. Garcia*, 123 S.W.3d 335, 343 (Tenn. 2003) (finding the state and federal search and seizure provisions “identical in intent and purpose”) (citation omitted).

¹²¹ *Robinette*, 685 N.E.2d at 767. The court cited two cases for the proposition that it had applied the “persuasive reasons” approach to several other provisions. *Id.* at 766 (citing *State v. Gustafson*, 668 N.E.2d 435, 441 (Ohio 1996); *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 60 (Ohio 1994)). In fact, although both of these cases interpret the Ohio Constitution coextensively with the United States Constitution, neither of them mentions the “persuasive reasons” (criteria) approach.

¹²² *People v. Caballes*, 851 N.E.2d 26 (Ill. 2006). See *Rainey v. Comm.*, 197 S.W.3d 89 (Ky. 2006), for a similar discussion.

¹²³ *Id.* at 33, 36, 45, 47.

¹²⁴ *Id.* at 43-46.

¹²⁵ *Id.* at 43.

¹²⁶ See, e.g., *People v. Collins*, 475 N.W.2d 684 (Mich. 1991).

state and federal constitutions are raised. In 1974, the Supreme Court of Oregon stated in a search and seizure case:

There are good reasons why state courts should follow the decisions of the Supreme Court of the United States on questions affecting the Constitution of the United States and the rights of citizens under the provisions of that Constitution, as well as under identical or almost identical provisions of state constitutions, as in this case. . . .

The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges, provided, of course, that this may be done in such a matter as not to violate the constitutional rights of the individual.¹²⁷

In this case the Oregon Supreme Court reversed its former independent approach and decided to follow the outcome of the United States Supreme Court in *United States v. Robinson*,¹²⁸ holding that a search of a person under custodial arrest was not unreasonable under the Fourth Amendment.¹²⁹

In *People v. Gonzalez*,¹³⁰ Judge Simons of the New York Court of Appeals stated: "We deem it desirable to keep the law of this State consistent with the Supreme Court's rulings on inventory searches"¹³¹ Judge Wachtler, dissenting, contended that the United States Supreme Court decisions were distinguishable, and noted: "It is often difficult enough to follow the Supreme Court's decisions in the Fourth Amendment area without also trying to anticipate them."¹³² The applicability of two, sometimes

¹²⁷ *State v. Florance*, 527 P.2d 1202, 1209 (Or. 1974) (footnote omitted).

¹²⁸ 414 U.S. 218 (1973). See *State v. Luck*, 312 S.E.2d 791 (Ga. 1984), and *Collins*, 475 N.W.2d at 685, and *Williams*, *Third Stage*, *supra* note 10, at 219-20, for other cases reversing state constitutional search and seizure doctrine to follow federal constitutional law, but see *State v. Williams*, 193 S.W.3d 502, 507 n.1 (Tenn.2006) (declining to follow United States Supreme Court's change of direction), and *State v. Nicholson*, 188 S.W.3d 649, 658 (Tenn. 2006) (same).

¹²⁹ See Richard D. Harmon & Terry J. Helbush, *Robinson at Large in the Fifty States: A Continuation of the State Bill of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE U. L. REV. 1 (1974), and Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085 (1982), regarding the reception of *Robinson* by state courts.

¹³⁰ 465 N.E.2d 823 (1984).

¹³¹ *Id.* at 825.

¹³² *Id.* at 826. See also *People v. P.J. Video*, 501 N.E.2d 556 (1986).

differing, sets of constitutional rules for law enforcement officials does present challenges.¹³³

G. Horizontal Federalism

As an alternative to a *vertical* view at what the United States Supreme Court has said in search and seizure cases, state courts and lawyers can and do look *horizontally* at what other state courts have done in these contexts. The New Hampshire garbage search decision, which also reached the opposite conclusion from *California v. Greenwood*, reflects this use of the “horizontal federalism” method of examining other state high court decisions on the matter under their state constitution.¹³⁴ In *State v. Goss*,¹³⁵ Justice Nadeau stated, “[w]e acknowledge that in finding protection under our State Constitution under these circumstances, we join a small minority of courts. . . . [H]owever, ‘we are persuaded that the equities so strongly favor protection of a person’s privacy interest that we should apply our own standard rather than defer to the federal provision.’”¹³⁶

Given the large number of search and seizure cases in state courts, and the modern research methods, state courts are remiss if they do not look at what their sibling state courts have concluded about the matter under review.

H. State Action

Scholars, lawyers, and students who are familiar with search and seizure law will recognize that the state action doctrine raises an important question about the reach of the Fourth Amendment and state constitutional search and seizure protections. Are searches and seizures carried out by private persons proscribed by the Fourth Amendment? When the state *extends* a

¹³³ See Ronald Susswein, *The Practical Effect of the “New Federalism” on Police Conduct in New Jersey*, 7 SETON HALL CONST. L.J. 859 (1997).

¹³⁴ G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 2 (1988).

¹³⁵ 834 A.2d 316 (2003).

¹³⁶ *Id.* at 320 (quoting *State v. Hempele*, 576 A.2d 793, 814 (N.J. 1990)).

search that was initiated by *private* parties, must it first obtain a search warrant?

Under the Federal Fourth Amendment, a warrantless search by private parties does not require the exclusion of evidence.¹³⁷ This is due to the federal constitutional “state action” doctrine which applies as well in various contexts other than search and seizure. However, state constitutional law doctrines, in similar contexts, may have no state action requirement, or at least a *reduced* state action requirement.¹³⁸ State constitutional search and seizure protections, therefore, may be applied to exclude evidence obtained by private searches or combined private/public searches under circumstances where the Federal Fourth Amendment would not be applicable.¹³⁹ This could be one of the areas where state courts “experiment” by applying their search and seizure provisions at points on the continuum of state action that would not be reached by the rigid federal state action doctrine. Eventually, the results of such experiments might have some reciprocal influence leading to slight modifications in the federal doctrine.

The question of applying the state constitutional exclusionary rule to a search by a *private* security guard arose in California in 1979. In *People v. Zelinski*,¹⁴⁰ the court noted that because

¹³⁷ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Walter v. United States*, 447 U.S. 649, 656 (1980); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). See generally 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 1.8 (4th ed. 2004); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 4.02 (4th ed. 2000); John M. Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627 (1981); Steven Euler, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649 (1980); Sam Kamin, *Little Brother is Watching You: The Importance of Private Actors in the Making of Fourth Amendment Law*, 79 DEN. U. L. REV. 517 (2002).

¹³⁸ On the state action doctrine under state constitutions, see generally Kevin Cole, *Federal and State “State Action”: The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327 (1990), and John Devlin, *Constructing an Alternative to “State Action” as a limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819 (1990), and Jennifer Friesen, *Should California’s Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 HASTINGS CONST. L.Q. 111 (1989), and Scott E. Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139 (1989).

¹³⁹ See FRIESEN, *supra* note 20, at § 11.014; LATZER, *Criminal Justice*, *supra* note 20, at 43-44.

¹⁴⁰ 594 P.2d 1000 (Cal. 1979).

of the tremendous rise in the use of private security services,¹⁴¹ “we recognize that in our state today illegal conduct of privately employed security personnel poses a threat to privacy rights of Californians that is comparable to that which may be posed by the unlawful conduct of police officers.”¹⁴² The court ordered the suppression of evidence obtained in a search by a store detective of a patron’s handbag who was suspected of shoplifting because state law only authorized detention until law enforcement officers arrived.¹⁴³ This California approach has, however, been overruled by a constitutional amendment barring the exclusion of evidence not seized in violation of the *Federal* Constitution.¹⁴⁴

The Montana Supreme Court ordered the suppression of evidence seized under a warrant that was issued as a result of a private citizen trespassing on her neighbor’s property to take a leaf from a marijuana plant and hand it over to law enforcement authorities.¹⁴⁵ Interestingly, the court relied in addition on the separate, textual privacy guarantee in the Montana Constitution¹⁴⁶ to recognize enhanced protection from private searches beyond Federal Fourth Amendment standards.¹⁴⁷ This is another interesting methodology. The Montana case could also be seen as an *extension* of a private search by law enforcement authorities, a sort of “silver platter” situation.¹⁴⁸

¹⁴¹ *Id.* at 1005 (“[T]he private security sector has become the largest single group in the country engaged in the prevention of crime.”).

¹⁴² *Id.* See also *State v. Nelson*, 354 So. 2d 540 (La. 1978).

¹⁴³ *Zelinski*, 594 P.2d at 1005.

¹⁴⁴ CAL. CONST. art. I, § 28(d); *In re Christopher H.*, 278 Cal. Rptr. 577, 579-80 (Cal. App. 1991).

¹⁴⁵ *State v. Helfrich*, 600 P.2d 816 (Mont. 1979), *overruled by* *State v. Long*, 700 P.2d 153 (Mont. 1985); see also *State v. Malkuch*, 154 P.3d 558, 560 (Mont. 2007). *Contra*, *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11 (N.J. 1992) (finding no state constitutional search and seizure protection from private, employment-related drug testing, but recognizing a common-law privacy right, with the state constitutional privacy right as a source of public policy).

¹⁴⁶ MONT. CONST. art. II, § 10.

¹⁴⁷ *Helfrich*, 600 P.2d at 818 (diverging from *Burdeau v. McDowell*, 256 U.S. 465 (1921)); see also *State v. \$129,970.00 in U.S. Currency*, 161 P.3d 816, 821 (Mont. 2007); *State v. Schwarz*, 136 P.3d 989, 990 (Mont. 2006).

¹⁴⁸ See *infra* Part II.I.

I. The Reverse Silver Platter Doctrine

Prior to *Mapp v. Ohio*,¹⁴⁹ federal search and seizure doctrine was more liberal than most states' search and seizure guidelines. State law enforcement officials could, usually, hand over to federal officials, evidence that could not have been lawfully seized by those same federal officials.¹⁵⁰ After *Mapp*, for a period, the state and federal standards were the same. Today, in many instances, it is the *states* that are more protective in search and seizure doctrine than federal law. As New Jersey Justice Alan B. Handler has observed:

This era of constitutional homogeneity faded; however, when various states began to establish search-and-seizure standards more protective than the minimum standards derived from the fourth amendment. *See, e.g., State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975). With this development of differing standards, the silver platter doctrine surfaced in situations implicating the parallel jurisdiction of federal and state officers. It again became necessary as a condition for use in a state court to sanitize evidence that may have been obtained under less protective federal-constitutional standards. *However, the polarity of the transfer process was reversed.* Instead of evidence being transferred to federal officers from state officers working under more lenient local standards, evidence might now flow to state officers from federal officers governed by more lenient standards.¹⁵¹

This has led to what is now called the "reverse silver platter doctrine."¹⁵² In the New Jersey case, mentioned above, the court con-

¹⁴⁹ 367 U.S. 643 (1961).

¹⁵⁰ *Lustig v. United States*, 338 U.S. 74, 78-79 (1949); *Byars v. United States*, 273 U.S. 28, 33 (1927). *See also* Burkoff, *supra* note 137, at 631-43.

¹⁵¹ *State v. Mollica*, 114 N.J. 329, 351 (1989). The quote is from the official *New Jersey Reports*, because the italicized sentence is missing from the *Atlantic Reporter*. *See State v. Mollica*, 554 A.2d 1315, 1326-27 (N.J. 1989).

¹⁵² *See* Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 869-84 (1991). *See generally* Jill E. Fisch, *Turf Wars: Federal/State Cooperation and the Reverse Silver Platter Doctrine*, 23 CRIM. L. BULL. 509 (1987); Tom Quigley, Comment, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 285 (1988) (discussing silver platter doctrine); Barry A. Spevack, Note, *Expanding State*

cluded that evidence seized legally by *federal* law enforcement officials (telephone billing records that could not have been legally seized by state law enforcement officials without a warrant) could be introduced in a *state* court proceeding after the federal officials declined to prosecute even though it would have been illegal for the state law enforcement officers to seize the evidence. The court reasoned that the deterrence rationale of the state exclusionary rule could not affect federal officials as long as they were not acting in an agency relationship with state officers.¹⁵³ The New Mexico Supreme Court, however, has reached the opposite conclusion.¹⁵⁴

Federal-state or state-federal relationships are usually implicated in considering silver platter problems. However, there are also private-public relationships that must be analyzed under both state and federal constitutional law.¹⁵⁵ The Rhode Island Supreme Court addressed this issue in the *von Bulow* case.¹⁵⁶ The situation surrounding the search and seizure in *von Bulow* illustrates one of the other circumstances—private searches—where evidence seized in a search can be delivered to authorities on a “silver platter.” Professor Alan Dershowitz (counsel in the appeal) described the problem as follows:

The constitutional issue posed by this private search whose fruits were then turned over to the police and public prosecutors was an important one. A wealthy family's hiring its own private police—who are not bound by the Bill of Rights—raised a profound civil liberties issue which had long interested me. The increasing utilization of private security guards and vigilante organizations had already forced several courts to confront this problem with differing results

Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?, 8 LOY. U. CHI. L.J. 186 (1976).

¹⁵³ *Mollica*, 554 A.2d at 1326-27; *accord* *State v. Bridges*, 925 P.2d 357, 364-72 (Haw. 1996). The New Jersey court excluded evidence where state and local officials were working together. *State v. Knight*, 678 A.2d 642 (N.J. 1996).

¹⁵⁴ *State v. Cardenas-Alvarez*, 25 P.3d 225, 227 (N.M. 2001).

¹⁵⁵ *Burkoff*, *supra* note 137, at 635-43.

¹⁵⁶ *State v. von Bulow*, 475 A.2d 995 (R.I. 1984). *See supra* notes 57-64 and accompanying text.

I certainly wanted to include this line of argument, but I was concerned about focusing too heavily on it. "It's a guilty man's argument," I told Claus.¹⁵⁷

The Rhode Island Supreme Court reversed von Bulow's conviction on several grounds including search and seizure.¹⁵⁸ Justice Florence Murray first considered the warrant requirement under federal law. The court distinguished the federal cases upholding "field tests," where "it was a virtual certainty that the substances tested contained contraband and nothing else,"¹⁵⁹ and concluded that the conviction must be reversed on Fourth Amendment grounds.¹⁶⁰ Referring to the "double barrelled source of protection" afforded Rhode Island citizens by the state and federal constitutions, Justice Murray applied the state constitution to conclude that a warrant should have been procured prior to the police expansion of the private search.¹⁶¹

*J. Direct Cause of Action for Money Damages
for State Constitutional Search and Seizure Violations*

The standard remedy, of course, for search and seizure violations is the motion to suppress the evidence improperly seized prior to the ensuing criminal trial—the exclusionary rule. What happens where no criminal charges are brought? Could the aggrieved person bring an action for money damages?¹⁶² The United States Supreme Court has answered in the affirmative for Federal Fourth Amendment violations.¹⁶³

In 1996, the New York Court of Appeals held that a class action filed by nonwhite males, alleging that they were subject to a five-day "street sweep" by law enforcement officials trying to

¹⁵⁷ ALAN M. DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE VON BÜLOW CASE 66 (1986).

¹⁵⁸ *von Bulow*, 475 A.2d at 1012-20.

¹⁵⁹ *Id.* at 1016, *distinguishing* United States v. Jacobsen, 466 U.S. 109 (1984).

¹⁶⁰ *Id.* at 1021.

¹⁶¹ *Id.* at 1019-20.

¹⁶² See generally Friesen, *supra* note 16, at 1269-70. See also 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES ch. 7 (4th ed. 2006).

¹⁶³ *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388 (1971); Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995).

solve an aggravated assault by a "black male," stated a claim for money damages under the New York Constitution's search and seizure provision.¹⁶⁴ Referring to the claim as sounding in "constitutional tort,"¹⁶⁵ the court noted:

Constitutions assign rights to individuals and impose duties on the government to regulate the government's actions to protect them. It is the failure to fulfill a stated constitutional duty which may support a claim for damages in a constitutional tort action.¹⁶⁶

The court further noted that for a state constitutional provision to support a direct cause of action for money damages it must be "self-executing, that is, it takes effect immediately, without the necessity for supplementary or enabling legislation."¹⁶⁷ Finally, after analyzing the *Restatement of Torts*, *Bivens*, and common-law antecedents of the search and seizure clause, as well as constitutional convention debates on the search and seizure clause that assumed the availability of a damages remedy, the court approved a damages remedy.¹⁶⁸

The Connecticut Supreme Court, relying heavily on *Bivens*, has reached a similar result in the search and seizure context.¹⁶⁹

K. Subconstitutional State Search and Seizure Protections

Interestingly, there are a fair number of state search and seizure protections provided by statute or court rule: subconsti-

¹⁶⁴ *Brown v. State*, 674 N.E.2d 1129 (N.Y. 1996). See Gail Donoghue and Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447 (1998); Matthew S. Freedus, Comment, *A Cause of Action for Damages Under the State Constitution: Brown v. State of New York*, 60 ALB. L. REV. 1915 (1997); Martin A. Schwartz, *Claims for Damages for Violations of State Constitutional Rights—Analysis of the Recent Court of Appeals Decision in Brown v. New York; the Resolved and Unresolved Issues*, 14 TOURO L. REV. 657 (1998).

¹⁶⁵ *Brown*, 674 N.E.2d at 1132.

¹⁶⁶ *Id.* at 1133.

¹⁶⁷ *Id.* at 1137.

¹⁶⁸ *Id.* at 1138-40.

¹⁶⁹ *Binette v. Sabo*, 710 A.2d 688 (Conn. 1998). See also *Newell v. Elgin*, 340 N.E.2d 344 (Ill. App. Ct. 1976), *superceded by statute*, ILL. COMP. STAT. 85/2-201 (1986), *as recognized in* *Reese v. May*, 955 F. Supp. 869 (N.D. Ill. 1996); *Moresi v. Dep't of Wildlife & Fisheries*, 567 So. 2d 1081, 1091-93 (La. 1990); *Widgeon v. E. Shore Hosp. Ctr.*, 479 A.2d 921 (Md. 1984); *Cassady v. Yellowstone Co. Sheriff's Dep't*, 143 P.3d 148, 154 (Mont. 2006).

tutional rights protections. For example, Chapter 276, Section 1 of the Massachusetts General Laws provides:

A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.¹⁷⁰

This provides more protection, *statutorily*, than *United States v. Robinson*.¹⁷¹

The Delaware Supreme Court rejected an argument that the good-faith exception to the warrant requirement should apply because of a Delaware *statute* prohibiting nighttime searches of dwelling houses except in exigent circumstances.¹⁷² The Georgia Supreme Court reached a similar result based on a state statute mandating the suppression of evidence seized without probable cause.¹⁷³ Chief Justice Clarke wrote a short concurring opinion:

I concur with the majority opinion. I write only to emphasize that the extension of the exclusionary rule to the facts in this case rests not on a constitutional right. It simply rests on the statute passed by the legislature and we simply hold that the courts are bound by that statute.¹⁷⁴

¹⁷⁰ MASS. GEN. LAWS, ch. 276, § 1 (1986).

¹⁷¹ 414 U.S. 218 (1973). See *Commonwealth v. Madera*, 521 N.E.2d 738, 740 (Mass. 1988). See also Maine Civil Rights Act, ME. REV. STAT. ANN. tit. 5, §§ 4681-4685 (Supp. 1997); John C. Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 STETSON L. REV. 241, 268-72 (1989) (discussing state statutes which provide more protection than the Federal Constitution); George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53 (1989).

¹⁷² *Mason v. State*, 534 A.2d 242 (Del. 1987). See also FRIESEN, *supra* note 20, at §§ 11.03 [3][b], [4][b].

¹⁷³ *Gary v. State*, 422 S.E.2d 426 (Ga. 1992). See K.R. Blackwell, Note, *Gary v. State: The Georgia Supreme Court Dodges a Confrontation with the Good Faith Exception*, 32 GA. L. REV. 927 (1998), for a critique of the *Gary* decision.

¹⁷⁴ *Gary*, 422 S.E.2d at 430 (Clarke, J., concurring). See also *Dodson v. State*, 150 P.3d 1054, 1056-58 (Okla. Crim. App. 2006) (statute barring anticipatory warrants).

Judge-made “prophylactic rules” represent another area of possible state subconstitutional protections from unreasonable search and seizure.¹⁷⁵ The New Jersey Supreme Court recently engaged in an interesting, and unusually candid, discussion of the merits of a prophylactic rule rather than a state constitutional ruling in a search and seizure case.¹⁷⁶

*L. “Forced Linkage” Search and Seizure Amendments
to State Constitutions*

While a number of state courts interpret their state constitutional search and seizure provisions in “lockstep” with Federal Fourth Amendment jurisprudence, in several states the constitutions have been amended to *require* the courts to interpret such provisions in lockstep with, or to follow a “forced linkage” to, federal constitutional doctrine in search and seizure cases.¹⁷⁷ Florida’s search and seizure clause was amended in 1982 to mandate: “This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.”¹⁷⁸

Surprisingly, Chief Justice Warren Burger wrote a concurring opinion in a Florida search and seizure case where the Court dismissed the writ as improvidently granted because it reflected an interpretation of the Florida Constitution that was likely more protective than federal doctrine, but was based on adequate and independent state grounds.¹⁷⁹ Despite the fact that the Court had no jurisdiction, the Chief Justice noted the “untoward result”¹⁸⁰ in the Florida court and wrote:

¹⁷⁵ See generally Honorable Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283 (2003).

¹⁷⁶ State v. Carty, 790 A.2d 903 (N.J. 2002), modified by 806 A.2d 798 (N.J. 2002).

¹⁷⁷ FRIESEN, *supra* note 20, at § 11.02 [3]; Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida’s “Forced Linkage” Amendment*, 39 U. FLA. L. REV. 653 (1987).

¹⁷⁸ FLA. CONST. art. I, § 12. See Slobogin, *supra* note 177; see also Paul R. Joseph, *No Different Drummer: The Effect of the 1983 Amendment to Article I, § 12 of the Florida Constitution*, 5 ST. THOMAS L. REV. 101 (1992).

¹⁷⁹ Florida v. Casal, 462 U.S. 637, 637 (1983).

¹⁸⁰ *Id.*

The people of Florida have since shown acute awareness of the means to prevent such inconsistent interpretations of the two constitutional provisions As amended, that section ensures that the Florida courts will no longer be able to rely on the State Constitution to suppress evidence that would be admissible under the decisions of the Supreme Court of the United States.¹⁸¹

A similar amendment was included in the California Constitution.¹⁸² These amendments illustrate a central feature of state constitutional law: judicial interpretations of state constitutions, including search and seizure provisions, can be “overruled” in the state political process by amendments to the state constitution. Thus, state constitutional rights can be subject to majoritarian, political review subject only to the national minimum standards (“least common denominator”) or “floor” of the Federal Bill of Rights.¹⁸³

III. CONCLUSION

Search and seizure litigation can be based on numerous fact-specific distinctions, in a wide variety of specific situations. At each of these myriad decision points are opportunities for state courts to interpret their state constitutions to reach more protective outcomes than those under the Fourth Amendment. The *merits* of these decisions are an extremely important area for study and analysis.

¹⁸¹ *Id.* at 638. One state court justice, responding to this suggested interference with state law, objected to the United States Supreme Court’s “intrusionary policy,” stating:

The danger of this intrusionary policy is fully exemplified by the arrogance of a concurring opinion in *Florida v. Casal*, — U.S. —, 103 S. Ct. 3100, 77 L. Ed. 2d 277 (1983). There the United States Supreme Court let stand a decision of the Florida Supreme Court that appeared to have relied on a state constitutional provision and state statute in reaching its decision. But the Chief Justice of the United States did not agree with the decision of the Florida Supreme Court and suggested that the United States Supreme Court was the sole repository of judicial wisdom and rationality.

State v. Jackson, 672 P.2d 255, 264 (Mont. 1983) (Shea, J., dissenting).

¹⁸² CAL. CONST. art. I, § 28(d).

¹⁸³ Williams, *Shadow*, *supra* note 27, at 381-84.

This article, by contrast, has been a nonexhaustive review of the *methodology* issues that arise in state court litigation of state constitutional search and seizure issues. These varying approaches will contribute to the development of a state's search and seizure jurisprudence just as surely as will the outcome, reasoning and holdings on the merits of those cases.

REACTIVE AND INCOMPLETELY THEORIZED STATE CONSTITUTIONAL DECISION-MAKING

*Lawrence Friedman**

I. INTRODUCTION

By the late 1970s, United States Supreme Court Justice William J. Brennan, Jr., saw as numbered the days in which a majority of the Court would vote to generously interpret and apply the provisions of the Bill of Rights.¹ And so, in the pages of the *Harvard Law Review*, he urged individual rights proponents to view state constitutions as a source of protections that might extend beyond those contained in the Federal Constitution.² His essay heralded the modern age of independent state constitutionalism,³ and, in the years since its publication, state courts in numerous decisions have invoked their sovereign authority to interpret and apply their states' constitutions to

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¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977).

² *Id.* Justice Brennan also advocated for enhanced protections under state constitutions in his dissenting opinions. See, e.g., *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

³ See Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 809 (2000) (noting that "[c]onventional wisdom attributes the genesis" of state constitutional movement to Justice Brennan's essay); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (declaring Justice Brennan's *Harvard Law Review* essay the "Magna Carta of state constitutional law").

protect individual rights and liberties more broadly than does the Federal Constitution.⁴

Many of these decisions can be viewed as reactive, with the state court content to announce disagreement with the Supreme Court's interpretation of the parallel provision of the Federal Constitution and to hold that the state constitution protects more broadly the individual right or liberty in question. These reactive decisions, aside from the result and perhaps a brief discussion of the federal case or cases with which there is disagreement, typically provide scant explanation for the result beyond a reference to such grand concepts as liberty, equality, or privacy, which the framers of the state constitution held dear.⁵

In *State v. Tanaka*,⁶ for example, the Supreme Court of Hawaii considered whether the Hawaii Constitution allows warrantless searches of residential trash bags by government agents.⁷ Those federal courts that had addressed the issue concluded that individuals have no expectation of privacy in their personal garbage under the Federal Constitution.⁸ The Supreme Court of Hawaii, however, held to the contrary, ruling that an individual's expectation of privacy in closed trash bags was objectively reasonable.⁹ The court announced this conclusion with little explanation, except to note that "the Hawaii Constitution

⁴ See Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1017-18 (1997) (noting that commentators "have stopped counting" the number of cases in which state courts have sought to independently interpret the individual rights protections of their states' constitutions).

⁵ See Lawrence Friedman & Charles H. Baron, *Baker v. State and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125, 127 (2001) ("Citation to a federal opinion . . . too often serves as a substitute for the considered reasoning that should accompany a particular interpretation of a state's constitution."). See also James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1991) (noting that the "terms and conventions" of state constitutionalism in individual rights cases "are often borrowed wholesale from federal constitutional discourse").

⁶ 701 P.2d 1274 (Haw. 1985).

⁷ See *id.* at 1276.

⁸ See, e.g., *United States v. Vahalik*, 606 F.2d 99, 101 (5th Cir. 1979), *cert. denied* 444 U.S. 1081 (1980). The Supreme Court of Hawaii considered *Tanaka* prior to the United States Supreme Court's ruling in *California v. Greenwood*, 486 U.S. 35 (1988), in which the Court held that "society would not accept as reasonable [a] claim to an expectation of privacy in trash left for collection in an area accessible to the public." *Id.* at 41.

⁹ *Tanaka*, 701 P.2d at 1276.

recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights.”¹⁰

Now, there is nothing inherently wrong with rejecting federal precedent in a case like *Tanaka*, and reactive decisions have received the support of commentators. Leigh A. Morrissey has argued that “no reason exists to consider reactive decisions less principled or legitimate” than any other state court decision rejecting a United States Supreme Court precedent.¹¹ And James Gardner has suggested that essentially reactive state court rulings on individual rights issues may check the Supreme Court’s exercise of its power in respect to these issues when the state court highlights the flaws in the Court’s interpretive logic and reasoning.¹²

Still, while reactive state constitutional decisions legitimately may counter national judicial power in the way that Gardner suggests, these decisions are problematic to the extent they lack completely theorized justifications for their holdings. A “completely theorized justification,” as Cass Sunstein has explained, refers to the basis for the judicial exercise of interpretive judgment—it clarifies what led a court to conclude that a constitutional command has a particular meaning.¹³ It encompasses as well the rationale underlying a court’s explication of the doctrinal standards and rules with which a constitutional command will be applied in discrete cases.¹⁴

¹⁰ *Id.*

¹¹ Leigh A. Morrissey, *State Courts reject Leon on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 VAND. L. REV. 917, 940 (1994).

¹² See James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1033 (2003) (discussing the ways in which “[s]tate judicial rejection of excessively narrow Supreme Court precedents concerning the scope of individual rights helps check national power”); cf. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 125-26 (2000) (reasoning that the federal constitutional value of dialogue supports independent state constitutional decision-making in cases concerning individual rights issues settled under federal law).

¹³ See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 7-9 (1999). Such justifications might include, say, a concern to view individual rights protections as connected to the reinforcement of democratic processes. See *id.* at 7; see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

¹⁴ See RICHARD H. FALLON, *IMPLEMENTING THE CONSTITUTION* 38 (2001) (distinguishing between the identification of constitutional norms and “crafting doctrine or developing standards of review”).

Two distinct dispiriting effects follow from reactive state constitutional rulings that lack completely theorized rationales. First, from the perspective of constitutional discourse, a reactive and incompletely theorized decision is not likely to contribute meaningfully to the larger discourse about the extent and nature of the commitments contained in the "great ordinances" of the federal and state constitutions, those vague but essential constitutional provisions that secure individual rights protections like equality, due process, free expression, and the freedom from unreasonable searches and seizures.¹⁵ Second, from the perspective of a state's constitutional jurisprudence, a reactive, incompletely theorized decision is likely to fail to supply judges, lawyers, government actors, and citizens with sufficient guidance to settle expectations about the bounds of those constitutional commitments.

In this article, I use state court consideration of the exclusionary rule's reach under state constitutional search and seizure provisions to illustrate the negative consequences of reactive and incompletely theorized state constitutional decision-making, and as a vehicle to suggest ways in which state courts may be persuaded to develop more completely theorized arguments to support the implementation of state constitutional individual rights protections. Part II begins with a review of the development of the exclusionary rule in the United States Supreme Court and in the state courts. The bulk of this part addresses the potential normative justifications for the understanding of the exclusionary rule that has prevailed in Pennsylvania and New Hampshire, where the high courts rejected deterrence as the principal rationale for the rule.

Part III focuses on the failure of state courts to articulate more complete justifications for rejecting a good faith exception to the exclusionary rule. I argue that these decisions fail to contribute substantively to the legal discourse among judges, lawyers, and commentators about individual rights and liberties common to both the federal and state constitutions. Further,

¹⁵ See *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) ("The great ordinances of the Constitution do not establish and divide fields of black and white.").

incompletely theorized decisions provide little guidance to citizens, government actors, judges, and lawyers about the state constitutional limits of government authority in respect to individual rights.

Part IV discusses the concerns that may underlie a jurisprudential preference for incompletely theorized decision-making at the federal level, and I argue that the normative importance of state court contributions to constitutional discourse and the practical need to provide guidance to state and private actors outweigh the force of these concerns in the state constitutional context. Finally, Part V turns to the likelihood of change in state court practice; here, I conclude that the potential for state constitutional individual rights decisions that are more completely theorized depends primarily upon the tenacity and thoughtfulness of the lawyers who argue these matters before state court judges.

II. THE EXCLUSIONARY RULE AND ITS RATIONALES

Because state courts have routinely addressed the question whether their state constitutions provide criminal defendants greater protection from unreasonable searches and seizures than does the United States Constitution,¹⁶ the area of search and seizure provides an appropriate window through which to examine the consequences of incompletely theorized state constitutional rulemaking. I begin by reviewing the development of the exclusionary rule and the good faith exception to that rule in the United States Supreme Court before turning to the rejection of the good faith exception in Pennsylvania and New Hampshire

¹⁶ The criminal defense bar has diligently pressed arguments that state constitutional individual rights protections exceed their counterparts in the Fourth, Fifth, and Sixth Amendments to the United States Constitution. See, e.g., 2 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES, at 11-2 (3d ed. 2000) ("The last three decades have seen an exponential increase in the number of opinions rendered by state supreme courts interpreting state constitutional prohibitions on unreasonable searches and seizures."); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1148-51 (1985) (discussing state court opportunities to rule on criminal issues); Herbert P. Wilkins, *The State Constitution Matters*, BOSTON B.J., Nov.-Dec. 2000, at 4, 15 (discussing development of search and seizure jurisprudence under the Massachusetts Constitution).

and the potential normative justifications for the differing understanding of the exclusionary rule in those jurisdictions.

A. *The Exclusionary Rule*

The federal exclusionary rule requires that, when a search or seizure of an individual is deemed by a court to have violated the doctrinal rules of the Fourth Amendment,¹⁷ the evidence obtained as a result must be suppressed. The United States Supreme Court adopted the exclusionary rule in 1914, in *Weeks v. United States*.¹⁸ The *Weeks* Court viewed the rule as a necessary corollary to the prohibition against unreasonable searches and seizures, reasoning that the Fourth Amendment's protections would be hollow if the federal government could make use of evidence it obtained unlawfully.¹⁹

In *United States v. Calandra*,²⁰ decided in 1974, the Court signaled a retreat from the assumption in *Weeks* that the exclusionary rule is a constitutional requirement. Considering whether illegally seized evidence could be presented to a grand jury, the *Calandra* Court concluded that the exclusionary rule does not serve to redress the injury to the privacy of the search victim; rather, "the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."²¹ Because the purpose of the rule is to deter unlawful police conduct, the Court reasoned it should not be extended

¹⁷ The Fourth Amendment provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

¹⁸ 232 U.S. 383 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁹ See *id.* at 393-94. For the *Weeks* Court, moreover, the government included both the executive and judicial departments. See *id.* at 391-92 ("The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority . . ."). The Court later extended the exclusionary rule, in *Mapp v. Ohio*, to apply in all state prosecutions, pursuant to the Fourteenth Amendment. See 367 U.S. 643, 655 (holding that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court").

²⁰ 414 U.S. 338 (1974).

²¹ *Id.* at 347.

when the possible “incremental deterrent effect” is uncertain²²—as the Court held it would be in the grand jury context.²³

Calandra led to *United States v. Leon*,²⁴ decided in 1984. In *Leon*, the Court modified the exclusionary rule, in light of its deterrent purpose, to except searches conducted in good faith reliance on a search warrant that later proves to be defective.²⁵ The Court reasoned that “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”²⁶ In addition, the Court reaffirmed that the sole purpose of the exclusionary rule is to deter police misconduct—the rule is not a constitutionally required means of redressing an injury to the victim of an illegal search.²⁷

Since *Leon*, the United States Supreme Court has applied the good faith exception in many circumstances in which law enforcement officers relied in good faith upon a warrant that later proved to be defective.²⁸ In *Leon*’s wake,²⁹ however, several state supreme courts rejected the argument that a good faith exception should apply to application of the exclusionary rule

²² *Id.* at 351 (“Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal.”).

²³ *See id.* at 354-55.

²⁴ 468 U.S. 897 (1984).

²⁵ *See id.* at 922.

²⁶ *Id.*

²⁷ *See id.* at 906 (the exclusionary rule was not designed to “cure” a Fourth Amendment violation).

²⁸ *See, e.g., Arizona v. Evans*, 514 U.S. 1, 1 (1995) (applying good faith exception when police officer relied in good faith upon erroneous police computer record).

²⁹ The United States Supreme Court’s decision in *Leon* engendered no end of scholarly commentary and criticism. *See, e.g.,* Albert W. Alschuler, “Close Enough for Government Work”: *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309 (criticizing *Leon* Court’s estimation of costs and benefits of exclusionary rule); Robert M. Bloom, *Judicial Integrity: A Call for its Re-emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 467-71 (1993) (criticizing turn in exclusionary rule jurisprudence toward deterrence rationale); Yale Kamisar, *The “Police Practice” Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986* 143, 160-66 (Herman Schwartz ed., 1987) (discussing and criticizing narrowing of the exclusionary rule in *Calandra* and *Leon*); Wayne R. LaFave, “*The Seductive Call of Expediency*”: *United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895 (criticizing *Leon* Court for overstating costs of exclusionary rule and understating its benefits).

under state law.³⁰ The New York Court of Appeals declined to adopt the reasoning of *Leon* in 1985;³¹ Michigan followed in 1986;³² New Jersey in 1987;³³ North Carolina in 1988;³⁴ Connecticut in 1990;³⁵ Pennsylvania, Washington, and Vermont in 1991;³⁶ Idaho in 1992;³⁷ New Mexico in 1993;³⁸ New Hampshire in 1995;³⁹ and Alaska, Delaware, and Iowa in 2000.⁴⁰ Many of these rulings have been described as reactive decisions by commentators—as instances in which the state courts essentially based their rejection of the good faith exception upon a disagreement with the Court's reasoning in *Leon*.⁴¹

For purposes of discussing the limitations of incompletely theorized state constitutional decision-making, I focus on two cases: *Commonwealth v. Edmunds*, decided by the Supreme Court of Pennsylvania in 1991;⁴² and *State v. Canelo*, decided by the New Hampshire Supreme Court in 1995.⁴³ In *Edmunds*, the

³⁰ Additionally, many state courts have adopted a good faith exception under state law. See, e.g., *Jackson v. State*, 722 S.W.2d 831, 834 (Ark. 1987); *People v. Leftwich*, 869 P.2d 1260, 1271-72 (Colo. 1994); *State v. Huber*, 704 P.2d 1004, 1011 (Kan. Ct. App. 1985); *State v. Wilmoth*, 490 N.E.2d 1236, 1238-39 (Ohio 1986); *Hyde v. State*, 769 P.2d 376, 380 (Wyo. 1989). Indeed, there is some evidence that, prior to *Leon*, state court judges had no enthusiasm for the exclusionary rule. See, e.g., Bradley C. Canon, *Organizational Contumacy in the Transmission of Judicial Policies: The Mapp, Escobedo, Miranda, and Gault Cases*, 20 VILL. L. REV. 50, 61-76 (1974).

³¹ *People v. Bigelow*, 488 N.E.2d 451, 458 (N.Y. 1985).

³² *People v. Sundling*, 395 N.W.2d 308, 312-13 (Mich. Ct. App. 1986), *abrogated on other grounds* by *People v. Russo*, 497 N.W.2d 698 (Mich. 1992).

³³ *State v. Novembrino*, 519 A.2d 820, 857 (N.J. 1987).

³⁴ *State v. Carter*, 370 S.E.2d 553, 554 (N.C. 1988).

³⁵ *State v. Marsala*, 579 A.2d 58, 59 (Conn. 1990), *rev'd on other grounds*, 620 A.2d 1293 (Conn. 1993).

³⁶ *Commonwealth v. Edmunds*, 586 A.2d 887, 888 (Pa. 1991); *State v. Crawley*, 808 P.2d 773, 776 (Wash. Ct. App. 1991); *State v. Oakes*, 598 A.2d 119, 120 (Vt. 1991).

³⁷ *State v. Guzman*, 842 P.2d 660, 670-72 (Idaho 1992).

³⁸ *State v. Gutierrez*, 863 P.2d 1052, 1067-68 (N.M. 1993).

³⁹ *State v. Canelo*, 653 A.2d 1097, 1102 (N.H. 1995).

⁴⁰ *Blank v. State*, 3 P.3d 359, 370 (Alaska Ct. App. 2000), *rev'd on other grounds*, 90 P.3d 156 (Alaska 2004); *Dorsey v. State*, 761 A.2d 807, 817 (Del. 2000); *State v. Cline*, 617 N.W.2d 277, 278 (Iowa 2000), *abrogated on other grounds* by *State v. Turner*, 630 N.W.2d 601 (Iowa 2001).

⁴¹ See Morrissey, *supra* note 10, at 934-37 (discussing state court rejections of good faith exception under state law through 1994); see also Matthew A. Nelson, Note, *An Appeal in Good Faith: Does the Leon Good Faith Exception to the Exclusionary Rule Apply in West Virginia?*, 105 W. VA. L. REV. 719, 748-51 (2003) (discussing state court rejections of good faith exception under state law through 2002).

⁴² 586 A.2d 887 (Pa. 1991).

⁴³ 653 A.2d 1097 (N.H. 1995).

Supreme Court of Pennsylvania addressed whether Article I, Section 8 of the Pennsylvania Constitution⁴⁴ allows a good faith exception to the exclusionary rule.⁴⁵ Reviewing the history of Section 8, the court concluded that its framers intended that provision “to embody a strong notion of privacy,”⁴⁶ and that the exclusionary rule, rather than serving to deter police misconduct, had consistently been understood “to bolster the twin aims of Article I, Section 8; to wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause.”⁴⁷ Given the importance of privacy as a constitutional value,⁴⁸ the Pennsylvania court held that “[c]itizens in this Commonwealth possess such rights [to privacy and to probable cause], even where a police officer in ‘good faith’ carrying out his or her duties inadvertently invades [an individual’s] privacy or circumvents the strictures of probable cause.”⁴⁹ Under the Pennsylvania Constitution, the court viewed the rights to privacy, and to probable cause as a prerequisite to a valid search, as superior to any policy considerations promoted by a good faith exception to the exclusionary rule.⁵⁰

The New Hampshire Supreme Court addressed the good faith exception in *Canelo*.⁵¹ In considering whether to adopt the good faith exception, the court reviewed the history of the state constitutional protection against unreasonable searches and seizures under Part I, Article 19 of the New Hampshire Consti-

⁴⁴ Article I, Section 8 states in relevant part: “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures” PA. CONST. art. I, § 8.

⁴⁵ *Edmunds*, 586 A.2d at 891.

⁴⁶ *Id.* at 897. *See also id.* at 898 (“The right to be free from unreasonable searches and seizures . . . is tied into the implicit right to privacy in th[e] Commonwealth (quoting *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979)).”).

⁴⁷ *Id.* at 899.

⁴⁸ In the view of one commentator, the Pennsylvania courts have concluded they must interpret Article I, Section 8 to “give more weight to the demands of individual privacy than the federal courts give in parallel circumstances.” Seth F. Kreimer, *The Right to Privacy in the Pennsylvania Constitution*, in *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* § 33.2, at 787 (Ken Gormley ed., 2004).

⁴⁹ *Edmunds*, 586 A.2d at 899. The court accordingly reasoned that “the good faith exception to the exclusionary rule would directly clash with those rights of citizens as developed in [the] Commonwealth over the past 200 years.” *Id.* at 901.

⁵⁰ *See id.* at 904 (noting that “the underlying premise of *Leon* is still open to serious debate”).

⁵¹ *State v. Canelo*, 653 A.2d 1097 (N.H. 1995).

tution⁵² and the policies animating the various aspects of the state's search and seizure jurisprudence.⁵³ The court recognized that Part I, Article 19 "safeguards privacy and protection from government intrusion" and "manifests a preference for privacy over the level of law enforcement efficiency which could be achieved if police were permitted to search without probable cause or judicial authorization."⁵⁴ The court regarded the preference for privacy as a paramount concern and sufficient reason to reject the rationale of *Leon*:

The exclusionary rule serves to redress the injury to the privacy of the search victim and guard compliance with the probable cause requirement of part I, article 19. Enforcement of the rule places the parties in the position they would have been in had there been . . . no violation of the defendant's constitutional right to be free of searches [and seizures] made pursuant to warrants issued without probable cause. In so doing, the rule also preserves the integrity of the judiciary and the warrant issuing process.⁵⁵

The court accordingly rejected a good faith exception as "incompatible with and detrimental to . . . citizens' strong right of privacy inherent in part I, article 19 and the prohibition against the issuance of warrants without probable cause."⁵⁶

B. Exclusionary Rule Rationales

The exclusionary rule is one means by which the constitutional protection against unreasonable searches and seizures may be effectuated, and the way in which the exclusionary rule is applied in turn may be supported by multiple rationales. The United States Supreme Court, following a pragmatic approach that emphasizes instrumental goals and the lessons of experi-

⁵² Part I, Article 19 states in relevant part: "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." N.H. CONST. pt. I, art. 19.

⁵³ See *Canelo*, 653 A.2d at 1103-04.

⁵⁴ *Id.* at 1104-05.

⁵⁵ *Id.* at 1105 (alteration in original) (citations and quotation marks omitted).

⁵⁶ *Id.*

ence,⁵⁷ confirmed in *Calandra* that deterrence is the exclusive rationale for the federal exclusionary rule, and it adopted the good faith exception in *Leon* because excluding evidence seized in good faith reliance upon a defective warrant would not, in the Court's view, enhance the rule's deterrent effect.⁵⁸ In contrast, both the Supreme Court of Pennsylvania in *Edmunds* and the New Hampshire Supreme Court in *Canelo* rejected deterrence as the primary rationale for the exclusionary rule.⁵⁹

Both the *Edmunds* and *Canelo* courts adverted to privacy and the probable cause requirement in rejecting a good faith exception to the exclusionary rule. But privacy and respect for the probable cause requirement do not, in themselves, supply a fully theorized justification for rejecting the exception. The United States Supreme Court, after all, is not unconcerned with privacy, broadly understood as the right to be free from unreasonable searches and seizures by government agents. Rather, the Court views an exclusionary rule premised upon deterrence of illegal conduct by government officials as the best means by which to protect legitimate privacy interests in light of the state's obligation to detect and punish criminal acts.⁶⁰ In this section, I review four alternative justifications for the exclusionary rule—institutional compliance, judicial integrity, separation of powers, and the expressive rationale for the exclusionary rule—and the extent to which the Pennsylvania and New Hampshire courts relied upon any of them in support of their understanding of the rule.

⁵⁷ See RICHARD A. POSNER, *OVERCOMING LAW 4-15* (1995) (discussing pragmatism and pragmatic approach in law).

⁵⁸ See *supra* notes 23-26 and accompanying text (discussing *Leon* and the United States Supreme Court's adoption of the good faith exception).

⁵⁹ See *Canelo*, 653 A.2d at 1105 (stating that deterrence of police misconduct is not "the rule's sole purpose"); *Commonwealth v. Edmunds*, 586 A.2d 887, 898 (Pa. 1991) (discussing Pennsylvania rule as "unshakably linked to a right of privacy" rather than to deterrence of police misconduct).

⁶⁰ See *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006) (noting that the exclusionary rule should be employed only to "vindicate" a person's entitlement to shield information from the government when the police conduct a warrantless search). See Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33 (2005), on the ascendancy of privacy theory in Fourth Amendment jurisprudence.

1. Institutional Compliance

Justice Brennan, in his dissent in *Leon*, argued that, even assuming deterrence provides the best rationale for the exclusionary rule, the majority had misunderstood the kind of deterrent effect the rule might have.⁶¹ According to Justice Brennan, the *Leon* majority saw the rule as a means to deter individual officers from conducting illegal searches, by creating an incentive system whereby individual officers would essentially be “punished,” through the exclusion of evidence at trial, when they failed to adhere to the Fourth Amendment’s dictates.⁶² Justice Brennan, on the other hand, saw “the chief deterrent function of the rule” as “its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.”⁶³ Operation of the exclusionary rule, in other words, would create incentives for the government to prevent illegal searches and seizures at the organizational level, and that “overall educational effect” should be considered in calculating the costs and benefits of applying the exclusionary rule in a given instance.⁶⁴

The *Edmunds* court flatly rejected any reliance upon deterrence as a basis for the exclusionary rule under Article I, Section 8 of the Pennsylvania Constitution.⁶⁵ The New Hampshire Supreme Court, by contrast, acknowledged in *Canelo* that deterrence of police misconduct remains an aim of the exclusionary rule.⁶⁶ Nonetheless, the decision does not suggest that the court embraced Justice Brennan’s larger conception of deterrence—that is, of an exclusionary rule aimed at creating institutional compliance with the prohibition on unreasonable searches and seizures. Nor did the court factor the possibility of encouraging that kind of deterrence into its reasoning, which focused on redressing the privacy injury suffered by the victim of an unconstitutional search.⁶⁷

⁶¹ See *United States v. Leon*, 468 U.S. 897, 952 (1984) (Brennan, J., dissenting).

⁶² See *id.* at 952-53.

⁶³ *Id.* at 953.

⁶⁴ See *id.* at 955.

⁶⁵ See *Commonwealth v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991).

⁶⁶ See *State v. Canelo*, 653 A.2d 1097, 1105 (N.H. 1995).

⁶⁷ *Id.*

2. Judicial Integrity

Next, there is the argument that the interest in protecting judicial integrity animates the exclusionary rule. In *Weeks v. United States*,⁶⁸ the United States Supreme Court adopted the exclusionary rule as a bar to the admission in federal courts of evidence illegally obtained by the government.⁶⁹ The Court stated that, to sanction the admission of illegally seized items into evidence “would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.”⁷⁰ Some forty-six years later, in *Elkins v. United States*,⁷¹ the Court expressed concern for “the imperative of judicial integrity” and denounced circumstances in which judges might participate in the use of illegally obtained evidence.⁷² But, in 1965, just a few years after *Elkins*, the Court announced deterrence as the central justification for the exclusionary rule.⁷³ There followed *United States v. Calandra*,⁷⁴ in which the Court held that the exclusionary rule’s “prime purpose is to deter future unlawful police conduct.”⁷⁵

In his dissenting opinion in *Calandra*, Justice Brennan gave voice to the argument for judicial integrity and the implications of a commitment to judicial integrity as a justification for the exclusionary rule. He believed the deterrence rationale to be inconsistent with the intent of the Framers of the United States Constitution.⁷⁶ The Framers, he argued, had in mind a system of government in which official conduct would be cir-

⁶⁸ 232 U.S. 383 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁶⁹ *Id.* at 392.

⁷⁰ *Id.* at 394.

⁷¹ 364 U.S. 206 (1960).

⁷² *Id.* at 222. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court reiterated a concern for “the imperative of judicial integrity,” reasoning that “[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.” *Id.* at 659.

⁷³ *Linkletter v. Walker*, 381 U.S. 618, 637 (1965) (declining to apply *Mapp* retroactively because purpose of exclusionary rule is to deter future misconduct).

⁷⁴ 414 U.S. 338 (1973) (declining to apply exclusionary rule in grand jury proceedings). See also *supra* notes 20-22 and accompanying text.

⁷⁵ *Calandra*, 414 U.S. at 347.

⁷⁶ *Id.* at 356 (Brennan, J., dissenting).

cumscribed by legal limits, a system that would require an enforcement mechanism:

[T]he enforcement tool had necessarily to be one capable of administration by judges. The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.⁷⁷

For the Fourth Amendment to retain its relevance, the courts would need to avoid even the appearance of acquiescing to illegal government action; in Justice Brennan's view, the exclusionary rule served to keep the judiciary from the "taint of partnership in official lawlessness."⁷⁸

The *Edmunds* court did not base its rejection of the good faith exception upon the judicial integrity rationale; in fact, the court made no mention of it. And, while the New Hampshire Supreme Court in *Canelo* noted judicial integrity as an additional reason for rejecting the good faith exception to the exclusionary rule,⁷⁹ it is not clear how seriously the court believed

⁷⁷ *Id.* at 357.

⁷⁸ *Id.* The judicial integrity rationale has not been immune from criticism. *See, e.g.,* Commonwealth v. DeJohn, 403 A.2d 1283, 1298 (Pa. 1979) (Larsen, J., concurring in part and dissenting in part) (noting that laymen find "the judicial integrity rationale[] difficult to grasp, and many lawyers think the highest integrity of the adjudicative aspect of the criminal process lies in the separation of the guilty from the innocent on the basis of all the relevant evidence available" (quoting Carl McGowan, *Rule Making and the Police*, 70 MICH. L. REV. 659, 674 (1972))). The Supreme Court itself opined, in *Stone v. Powell*, 428 U.S. 465 (1976), that the judicial integrity rationale might logically become an impediment to the admission of illegally obtained evidence when a defendant fails to object—in such an instance, the Court would be party to the use of the fruit of the government's conduct. *Id.* at 485 (concern for integrity of the judicial process "has limited force as a justification for the exclusion of highly probative evidence"). Indeed, the Court went so far as to suggest that, contrary to the opinion in *Weeks*, judicial integrity might be compromised when a court allows the suppression of inculpatory evidence, and thereby contributes to the release of a person arguably guilty. *See id.* at 490.

⁷⁹ State v. Canelo, 653 A.2d 1097, 1105 (N.H. 1995) ("Enforcement of the rule places the parties in the position they would have been in had there been . . . no violation of the defendant's constitutional right to be free of searches [and seizures] made pursuant to warrants issued without probable cause. . . . In so doing, the rule also preserves the integrity of the judiciary and the warrant issuing process." (alteration in original) (citation omitted)).

judicial integrity to be an essential justification for the exclusionary rule. The court did not elaborate on judicial integrity as a constitutional matter, as opposed to a judicial policy, and the bulk of the *Canelo* opinion addressing the reasons for the exclusionary rule is concerned with the way in which the exclusionary rule redresses the "injury to the privacy of the search victim," thereby protecting New Hampshire citizens' "strong right of privacy."⁸⁰ It seems reasonable to conclude, then, that, as with institutional compliance, judicial integrity was not a principal justification for the exclusionary rule under the New Hampshire Constitution.

3. Separation of Powers

A third justification for the exclusionary rule flows from separation of powers principles. This argument has appeared in two forms. The first, advanced by Timothy Lynch, suggests that the exclusionary rule is a component of the separation of powers, and provides the means by which the judiciary can monitor and check the executive's power to undertake searches and seizures.⁸¹ The second, advanced by Thomas S. Schrock and Robert C. Welsh some thirty years ago, suggests that the exclusionary rule is simply judicial review by another name.⁸²

Lynch sought to justify the exclusionary rule by relying upon the structural separation of powers in the United States Constitution between the legislative, executive, and judicial departments, a separation premised on the belief that such structural divisions serve to check and balance the power of each department.⁸³ In respect to the power of the government to search and to seize, the Fourth Amendment indicates that the judiciary has the authority to control and supervise the search warrant process when that process is initiated by the executive; in

⁸⁰ See *id.* at 1105. Subsequent decisions of the New Hampshire Supreme Court, moreover, have not expanded on the judicial integrity rationale. See *infra* notes 136-48 and accompanying text.

⁸¹ See Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711 (2000).

⁸² See Thomas S. Schrock & Robert C. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1975).

⁸³ Lynch, *supra* note 81, at 716.

Lynch's view, the amendment "manifests a preference for a procedure of antecedent justification that the police must follow before they can invade American homes or businesses."⁸⁴

If this is the case, then the exclusionary rule necessarily complements the principle of antecedent justification, for "[e]nforcement of the rule puts executive branch agents in the position they would have been in had no violation of the warrant clause [of the Fourth Amendment] occurred. Thus, the exclusionary rule restores the equilibrium that the Fourth Amendment established."⁸⁵ The exclusionary rule, in other words, allows the judiciary to protect its constitutional authority over the warrant process; that process would be ineffective, and the executive would remain unchecked, if the courts simply allowed agents of the executive to circumvent the strictures of the Fourth Amendment.⁸⁶ On this understanding, moreover, the question of the costs and benefits of the exclusionary rule is irrelevant, because "the president and Congress are not at liberty to conduct a cost-benefit analysis of constitutional guarantees and then adjust the meaning of those guarantees to comport with their findings."⁸⁷

The second version of the separation of powers argument posits the exclusionary rule as a manifestation of judicial review. The argument suggests the courts are obligated under *Marbury v. Madison*⁸⁸ to review governmental conduct alleged to be illegal under the Constitution:

[The defendant] has a right to have the court sitting in his case consult the Constitution when executive conduct related to his case is challenged under any of its parts. And when search and seizure conduct is successfully challenged as unreasonable, he has a due process right to exclusion of the disputed evidence, because exclusion is the only concrete expression which ad-

⁸⁴ *Id.* at 738.

⁸⁵ *Id.* at 739.

⁸⁶ *See id.* at 715-16 ("The most opportune time to check . . . unconstitutional behavior is when lawyers for the executive branch (prosecutors) attempt to introduce illegally seized evidence in court.").

⁸⁷ *Id.* at 747 (citing *Maryland v. Craig*, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting)).

⁸⁸ 5 U.S. (1 Cranch) 137 (1803).

verse judicial review of unreasonable search and seizure can take.⁸⁹

In other words, the exclusionary rule is simply what we call judicial review in the search and seizure context; as Schrock and Welsh put it:

[W]hether it be Congress abridging the freedom of speech or police officers making unreasonable searches and seizures, the fact is that governmental actors are doing something repugnant to the Constitution, and in each case the courts are being asked to cooperate and therefore condone that repugnant act. What is at stake in each case is the meaningfulness of the Constitution; the tendency of judicial acceptance of either kind of act is to make the Constitution meaningless.⁹⁰

On this view, a court should decline to adopt the good faith exception because it would be incompatible with the judicial responsibility to review government conduct and, if that conduct were found wanting under constitutional standards, invalidate it.⁹¹

The court in *Edmunds* appeared to ground its rejection of the good faith exception in the exception's incompatibility with the warrant-issuing process and, specifically, the probable cause requirement. The court stated that the exclusionary rule serves to ensure "that warrants shall only be issued upon probable cause,"⁹² and a citizen's search and seizure rights ought to obtain even when a law enforcement officer inadvertently "circumvents the strictures of probable cause."⁹³ Though this language lends support to the argument that the court endorsed a separation of powers rationale for the exclusionary rule, the court at the same time viewed the probable cause requirement as the means by which individual privacy may be protected, tying it directly to "the implicit right to privacy" enjoyed by Penn-

⁸⁹ Schrock & Welsh, *supra* note 82, at 309.

⁹⁰ *Id.* at 347.

⁹¹ *See id.* at 374 (observing that the constitutional exclusionary right reflects the rule of law, "and that for a court to admit unconstitutionally obtained evidence is to do violence to the *concept* of the rule of law").

⁹² *Commonwealth v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991).

⁹³ *Id.*

sylvania citizens.⁹⁴ Indeed, the court concluded, following a historical review, that the Framers of Article I, Section 8, designed the warrant-issuing process to protect the "paramount concern for privacy," and not to permit the judiciary to monitor executive conduct per se.⁹⁵

Further, while the *Edmunds* court's view of the exclusionary rule is not necessarily incompatible with an understanding of the rule as a species of judicial review, there is no indication in *Edmunds* that the court saw the exclusionary rule as simply an unremarkable instance of judicial review of government conduct. Besides the court's focus on individual privacy as the provision's "paramount concern," the discussion in the opinion of the various policy arguments associated with the exclusionary rule and the good faith exception makes no mention of the rule as a manifestation of judicial review.⁹⁶ This failure is notable, for the judicial review rationale, premised not upon individual privacy but institutional authority, would have raised a high bar to the contention that judicial review should be relaxed in the face of utilitarian determinations relating to the perceived "costs" of the exclusionary rule.⁹⁷

Similarly, the New Hampshire Supreme Court's opinion in *Canelo* does not seem to endorse either version of the separation of powers argument. Rather, the court expressed a preference for understanding the exclusionary rule as connected to a constitutional "preference for privacy."⁹⁸ The court viewed preservation of the "warrant issuing process" as another purpose of the exclusionary rule,⁹⁹ but it seems clear that, as in *Edmunds*, it is not the ability of the judiciary to control the warrant-issuing process that concerned the court, but, rather, the way in

⁹⁴ *Id.* at 898 (quoting *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979)).

⁹⁵ *Id.* at 897. *See also id.* at 899 (construing the probable cause requirement as "designed to protect us from unwarranted and even vindictive incursions upon our privacy").

⁹⁶ *See id.* at 901-05 (discussing policy considerations raised by the good faith exception to the exclusionary rule).

⁹⁷ *See Schrock & Welsh, supra* note 82, at 347 (in the exclusionary rule context, when government action offends any provision of the Constitution, "[w]hat is at stake in each case is the meaningfulness of the Constitution").

⁹⁸ *State v. Canelo*, 653 A.2d 1097, 1104 (N.H. 1995).

⁹⁹ *Id.* at 1105.

which the probable cause and warrant requirements serve to vindicate individual privacy interests.¹⁰⁰ In addition, like the Pennsylvania court in *Edmunds*, the court in *Canelo* made no mention of the judicial review rationale as a justification for the exclusionary rule and rejection of the good faith exception.¹⁰¹

4. The Expressive Rationale

Neither the Pennsylvania nor the New Hampshire court proffered an explanation of just what kind of “privacy” their respective constitutions protect, or what a constitutional commitment to the probable cause requirement might mean for privacy.¹⁰² But some form of individual privacy is plainly the interest that both courts sought to vindicate in rejecting the good faith exception to the exclusionary rule. Privacy, as noted above,¹⁰³ does not necessarily provide a rationale for applying the exclusionary rule in a particular way, but given the stated concern in both *Edmunds* and *Canelo* to protect privacy a fourth justification for the exclusionary rule and the concomitant rejection of a good faith exception presents itself: the expressive rationale.¹⁰⁴

a. The Expressive Dimension of the Protection Against Unreasonable Searches and Seizures

The expressive rationale is based on the notion that the meaning of conduct may be different from, but as significant as, the ends that an actor seeks to achieve through her actions. Conduct, in other words, can violate important governing norms not only by creating concrete costs—which would be the concern

¹⁰⁰ *Id.* (stating that “[t]he exclusionary rule serves to redress the injury to the privacy of the search victim and guard compliance with the probable cause requirement”).

¹⁰¹ *Id.* (discussing justifications for the exclusionary rule under New Hampshire law).

¹⁰² *See id.* at 1105.

¹⁰³ *See supra* note 100 and accompanying text (discussing relationship between privacy and the exclusionary rule).

¹⁰⁴ I address below the consequences of the courts’ respective failures to explicate the reasoning underlying the decisions. *See infra* notes 130-50 and accompanying text. Commentators have pointed out that judicial decisions “often cloak expressive considerations in non-expressive terms.” Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1532 (2000).

of a deterrence rationale—but by conveying a meaning that expresses inappropriate respect for an established societal norm of behavior.¹⁰⁵ When an actor, through her conduct, disrespects a societal norm, she conveys an incorrect valuation of an interest that governing norms dictate should be regarded in a particular way; the result is an expressive harm.¹⁰⁶ The expressive approach to law requires that expressive harm be answered through public correction of the actor's otherwise incorrect valuation of the interest at issue.¹⁰⁷ Such correction may be declared in the course of, or as a result of, litigation.¹⁰⁸

Consider a case in which the defendant is alleged to have committed a theft. The conviction by a jury of the defendant upon proof beyond a reasonable doubt answers publicly the thief's incorrect valuation of the victim's interest in the possession and control of her property: the verdict of guilt negates the defendant's incorrect valuation of the victim's interests, as defined by the governing norms in the criminal law.¹⁰⁹ In this way, the public declaration of criminal liability serves to emphasize for the community the standards for appropriate behavior—in the case of theft, how members of the community ought to properly value a person's interest in the possession and control of her property.¹¹⁰

¹⁰⁵ See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998). Law in its various forms is a touchstone of those governing norms that demand respect; the law in this way serves to define appropriate standards of conduct. See *id.*

¹⁰⁶ See Anderson & Pildes, *supra* note 104, at 1527.

¹⁰⁷ See JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98-101 (1970); see also Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (observing that a criminal conviction represents "a formal and solemn pronouncement of the moral condemnation of the community"); Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492, 493 (2001) (noting that expressive theories of law "prescribe expressing forms of . . . moral emotions, consistent with respect for the persons who are affected by [those emotions]").

¹⁰⁸ Judicial condemnation of expressive harm serves "to ensure that political and social relationships remain constituted according to the principles previously thought to govern them." Anderson & Pildes, *supra* note 104, at 1529.

¹⁰⁹ See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597-98 (1996) (discussing expressive dimensions of theft).

¹¹⁰ See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 351-52 (1996) (discussing the importance of asserting the standards by which persons and goods properly should be valued).

Privacy is accepted as an important individual interest, respect for which is advanced through a variety of governing norms. Those norms encompass both decision privacy and information privacy. Decision privacy concerns the ability of autonomous individuals to make important decisions about their lives absent interference from the government.¹¹¹ Information privacy, on the other hand, relates to the control individuals have over access to, and the dissemination of, information about themselves and their various activities.¹¹²

The protection against unreasonable searches and seizures expresses the value that attaches to information privacy as against the government's desire to obtain information—the significance the Framers assigned to an individual's ability to keep personal information from agents of the state.¹¹³ When those agents conduct searches without probable cause, or based upon faulty warrants, their actions express disrespect for the search

¹¹¹ See, e.g., *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (discussing individual's privacy interest "in independence in making certain kinds of important decisions"); *Paul v. Davis*, 424 U.S. 693, 713 (1976) (noting decision privacy interest in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education"). See also Michael J. O'Donnell, *Reading for Terrorism: Section 215 of the USA PATRIOT Act and the Constitutional Right to Information Privacy*, 31 J. LEGIS. 45, 49 (2004) (discussing *Whalen* and the distinction between decision privacy and information privacy).

¹¹² See ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (defining information privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1203 (1998) (describing "information privacy" as concerned with "an individual's control over the processing—i.e., the acquisition, disclosure, and use—of personal information").

¹¹³ See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (reasoning that the protection against unreasonable searches and seizures protects Americans "in their beliefs, their thoughts, their emotions and their sensations"); JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 75 (1997) (discussing Fourth Amendment privacy as "characterized as control over information about oneself"); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 47 (1966) (suggesting that the core concern of the protection against unreasonable searches and seizures is "the privacy of home and person . . . against the long reach of government"); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM & MARY L. REV. 197, 229 (1993) (concluding that "the broad principle" established by the Fourth Amendment "is that discretionary police power implicating [privacy] interests cannot be trusted"). See ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 (2006), on the expressive aspects of the Fourth Amendment and Fourth Amendment analysis.

victim's privacy interest; the unconstitutional search conveys the message that, notwithstanding the constitutional commitment to protection of that interest, the government simply can disregard the established rules that limit its authority to intrude upon privacy.¹¹⁴ In the face of such disrespect, the exclusionary rule serves to vindicate publicly the search victim's privacy interest: it represents the means by which the community, speaking through the judiciary, answers the government's incorrect valuation of privacy.¹¹⁵

A court declares that incorrect valuation through a finding that the government acted contrary to the demands of the protection against unreasonable searches and seizures, together with a decree that the information seized must be suppressed at trial. In this way, the parties are returned to the approximate positions they occupied before the illegal search or seizure occurred.¹¹⁶ A return to the status quo ante satisfies the expressive rationale because it both recognizes the expressive injury and reaffirms "the underlying normative principles for how the relevant relationships"—in this instance, the relationship between government and citizen—"are to be constituted."¹¹⁷

The language of the *Edmunds* and *Canelo* decisions suggests that each court's understanding of the exclusionary rule and rejection of a good faith exception finds plausible support in the expressive rationale. The court in *Edmunds* held "the exclusionary rule in Pennsylvania . . . serve[s] to bolster the twin aims of Article I, Section 8; to-wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be

¹¹⁴ Cf. Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 564 (2006) (discussing capacity of police misconduct to send "demeaning messages about human worth via morally inappropriate [conduct]").

¹¹⁵ See TASLITZ, *supra* note 113, at 65-66 ("The exclusionary rule empowers the judge not simply to give the defendant personally but to give the People as a whole the political benefit to which the Fourth Amendment's substance entitles them.").

¹¹⁶ See *Stringer v. State*, 491 So. 2d 837, 850 (Miss. 1986) (Robertson, J., concurring) (the exclusionary rule "places the parties in the position they would have been in had there been . . . no [constitutional] violation").

¹¹⁷ *Anderson & Pildes*, *supra* note 104, at 1529. The return is necessarily imperfect, of course, for privacy once breached cannot be fully restored—the search victim will never again have the same control over the information illegally obtained by the government.

issued upon probable cause.”¹¹⁸ The court ruled information privacy to be an individual interest of constitutional dimension, one which ought to prevail regardless whether government agents invade it deliberately or inadvertently.¹¹⁹ The court reasoned, in other words, that individuals suffer an expressive harm to their information privacy interest whether or not government agents acted in good faith when conducting a search: the expressive harm that results is the same in both encounters, and can be redressed only by the public declaration of redress—a suppression order—that follows from the operation of the exclusionary rule.

The New Hampshire Supreme Court in *Canelo* concluded “[t]he exclusionary rule serves to redress the injury to the privacy of the search victim and guard compliance [with the constitution].”¹²⁰ The “injury to privacy” suffered by the search victim is the expressive harm, and the court endorsed the public correction of that injury via a judicial finding, after a hearing on a motion to suppress, that the government in searching the defendant acted without constitutional authorization.¹²¹ The court’s conclusion that the good faith exception would be “incompatible with and detrimental to [a] citizens’ strong right of privacy”¹²² acknowledges that, no matter how the government invades an individual’s privacy, redress can be adequately accomplished only by operation of the exclusionary rule; the rule enables the courts to “guard compliance” with the constitutional commitment to privacy by reaffirming what that compliance requires of the government.¹²³

The expressive rationale offers an explanation for the reasoning and the results in both *Edmunds* and *Canelo*. It also explains why these courts did not consider alternative remedies for the injury to the search victim’s privacy. The courts might,

¹¹⁸ Commonwealth v. Edmonds, 586 A.2d 887, 899 (Pa. 1991).

¹¹⁹ See *id.*

¹²⁰ State v. Canelo, 653 A.2d 1097, 1105 (N.H. 1995).

¹²¹ *Id.* at 1099.

¹²² *Id.* at 1105.

¹²³ The exclusionary rule may also have the incidental effect of deterring future police misconduct, but such deterrence would simply be an additional benefit of the rule. That is to say, aside from any actual deterrent effect, the injury to privacy suffered by the search victim could be redressed only through the operation of the exclusionary rule.

for example, have allowed the admission of wrongfully seized evidence while urging the creation of a civil remedy against the government for unconstitutional searches and seizures.¹²⁴ But such a remedy would not satisfy the expressive rationale in the same way as suppression, for it would essentially commodify an individual's privacy interest: to allow a search victim to pursue damages as a recourse undermines the value of her information privacy by suggesting that the government can disrespect that interest by paying—literally—the cost of doing so.¹²⁵ Information privacy would be respected only to the extent of a valuation by a judge or jury, and correction of the government's erroneous valuation of an individual's privacy would hang on a contingency—on the possibility of a favorable outcome in a subsequent action for damages. That possibility could not sufficiently answer the government's initial showing of disrespect for the search victim's privacy, because, while it might address some material harm, it would not formally recognize the loss of control over information she once validly possessed.¹²⁶

¹²⁴ See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting) (proposing, to replace the suppression of evidence at trial, a remedial scheme that would allow search victims to seek compensation from the government for the constitutional violation); AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 40-43 (1997) (arguing for compensatory regimes premised upon government liability for unconstitutional searches and seizures).

¹²⁵ As Walter Dellinger has explained:

To abolish the exclusionary rule and replace it with an action for damages against the governmental treasury is to have the law speak with two voices. In the absence of the exclusionary rule, the law enforcement officer and the public generally are enticed to view the Constitution as Justice Holmes' "bad man" viewed the obligation of contracts. However one resolves the question of whether a valid contract creates a normative duty or merely presents an option to breach and pay damages, it is inconsistent with a constitutional system to view duties imposed by basic guarantees in the latter way.

Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972) (footnote omitted).

¹²⁶ See Anderson & Pildes, *supra* note 104, at 1539-40 (distinguishing between material and expressive harms in the equal protection context and concluding that different means of addressing an issue can produce different understandings for expressive purposes). Further, to prefer that individuals essentially "sell" their information privacy through a damages assessment after a civil proceeding would imperil the information privacy of all; values like information privacy cannot be commodified in one instance without having the effect of commodifying them—or at least undermining them—in other circumstances. Cf. ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 165

Nor could the expressive rationale support correction of the government's failure to respect an individual's information privacy through a judicial finding of illegality, but without an order declaring the suppression of the seized items. On this argument, the illegally seized information would not necessarily be suppressed at trial in view of the public interest in the admission of inculpatory evidence at the criminal trial of the search victim.¹²⁷ But the proper vindication of an individual's privacy interest entails more than just a finding that the government disrespected privacy; it also requires that the search victim be returned to the approximate position in relation to the government that she occupied before the illegal search or seizure, as noted above.¹²⁸ Absent that realignment of interests, the judicial declaration of the expressive harm and reaffirmation of the proper relationship between individuals and the government would ring hollow.¹²⁹

Simply put, the expressive rationale requires that public condemnation of the government's disregard for the search victim's privacy be complete, to restore that interest to its appropriate valuation in a public way. This is so not just because of the search victim's personal privacy interest, but because it is important to affirm the level of respect the government should accord every individual's interest in his or her information privacy. To hold otherwise—for example, by adopting a good faith exception to the exclusionary rule—would be to suggest that the information privacy norm embraced by the protection against unreasonable searches and seizures has less weight than other constitutional interests.

(1993) (arguing that allowing certain goods to be freely alienated undermines collective autonomy and "self-protection"); see generally Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843 (2002).

¹²⁷ See Laurence Naughton, Note, *Taking Back Our Streets: Attempts in the 104th Congress to Reform the Exclusionary Rule*, 38 B.C. L. REV. 205, 207 (1996) (discussing public dissatisfaction with the effect of the exclusionary rule).

¹²⁸ See *supra* notes 113-17 and accompanying text (discussing exclusionary rule as expressive remedy).

¹²⁹ See Anderson & Pildes, *supra* note 104, at 1529 (expressive remedies matter "because they express recognition of injury and reaffirmation of the underlying normative principles for how the relevant relationships are to be constituted").

b. After Edmunds and Canelo

If the *Edmunds* and *Canelo* courts had in mind a justification for the operation of the exclusionary rule under the Pennsylvania and New Hampshire Constitutions and the rejection of the good faith exception that runs deeper than mere disagreement with the *Leon* Court's conclusion, the expressive rationale would seem the most likely candidate. It remains to test this hypothesis. I do so in this section by looking at the ways in which the Pennsylvania and New Hampshire courts have construed and applied the reasoning of *Edmunds* and *Canelo*. How the courts in subsequent cases have viewed *Edmunds* and *Canelo* gives us some indication of just what the courts in those cases had in mind when they rejected *Leon*.

More than ten years after *Edmunds*, the Supreme Court of Pennsylvania in *Commonwealth v. Hughes*¹³⁰ addressed the question whether, consistent with Article I, Section 8 of the Pennsylvania Constitution, a search should be deemed "valid [when the investigating] officer is reasonably mistaken as to the actual authority of the party that consented to his entry into the premises."¹³¹ The case raised the issue of a third party's "authority" to consent to a search, and what steps the police must take to determine whether that third party had sufficient authority to consent; the existence of such authority, the court concluded, serves to exempt law enforcement from the ordinary requirements of probable cause and a warrant.¹³²

The *Hughes* court reasoned that, while "[t]he adoption of the good faith exception would have been inconsistent with . . . the heightened expectation of privacy" that Pennsylvania citizens enjoy, an apparent authority exception to the warrant requirement would not undermine that expectation.¹³³ Indeed, the court stated that inculpatory evidence would be admissible even

¹³⁰ 836 A.2d 893 (Pa. 2003).

¹³¹ *Id.* at 901.

¹³² *Id.* at 902-03.

¹³³ *Id.* at 902 (quotation marks omitted). The United States Supreme Court explicated the "apparent authority exception" to the warrant requirement under the Fourth Amendment in *Illinois v. Rodriguez*, 497 U.S. 177 (1990). The *Hughes* court took comfort in the number of state court decisions that have adopted the reasoning of *Rodriguez* under their state constitutions. *Hughes*, 836 A.2d at 903.

when police officers mistakenly relied upon the consent of a third party who is later shown not to have had the authority to consent to the search.¹³⁴ Further, the police need inquire into the basis of a party's authority to consent to a search only when "the situation is ambiguous and would cause a reasonable person to question the authority of the party who gave consent," or when that person's authority "appears to be unreasonable."¹³⁵

Hughes undermines the conclusion that the expressive rationale best explains the Pennsylvania court's understanding of Article I, Section 8's protection of individual privacy. Adherence to *Edmunds* would have required a stricter standard to govern the procedures the police must follow in determining whether a third party had the appropriate authority to give consent to search: if the government by its actions in *Edmunds*—the execution, in good faith, of an unsupported search warrant—expresses disrespect for the privacy of the search victim, it is not clear why it should suffice that government officers in good faith accept a third party's assertion of authority without some specific inquiry into the basis for that assertion.¹³⁶ The failure specifically to inquire into the third party's claimed authority would seem to show a corresponding disrespect for the search victim, by eliding the very consideration that the *Edmunds* court viewed as paramount to an analysis of the protection against unreasonable searches and seizures in the context of good faith reliance upon a warrant: actual rather than simply perceived authorization to search.

A similar puzzle presents itself in New Hampshire. In a case decided half a decade after *Canelo*, *Lopez v. Director, New Hampshire Division of Motor Vehicles*,¹³⁷ the New Hampshire Supreme Court addressed the question whether the exclusion-

¹³⁴ See *Hughes*, 836 A.2d at 903 ("When police officers obtain the voluntary consent of a third party, who has the authority to give consent, they are not required to obtain a search warrant based on probable cause.").

¹³⁵ *Id.*

¹³⁶ As Chief Justice Ralph J. Cappy—author of the *Edmunds* decision—argued in his *Hughes* dissent, before the apparent authority exception is invoked, police officers must obtain "unequivocal, specific, and voluntary consent to search the premises." 836 A.2d at 908 (Cappy, C.J., dissenting).

¹³⁷ 761 A.2d 448 (N.H. 2000).

any rule applies to driver's license revocation proceedings.¹³⁸ Lopez had been arrested for driving while intoxicated, and the state suspended his license because he had refused to submit to a blood alcohol test.¹³⁹ The hearing officer upheld the suspension, but Lopez appealed to the trial court, which concluded, first, that an underlying basis for a license suspension—in this case, the stop of Lopez's vehicle—must be constitutionally valid, and, second, that the exclusionary rule extends to license revocation proceedings.¹⁴⁰ The lower court found the stop invalid and, applying the exclusionary rule, vacated the suspension.¹⁴¹

On appeal, the New Hampshire Supreme Court concluded that the state need not demonstrate a valid stop and arrest in order to secure a license revocation.¹⁴² Further, the court ruled that the exclusionary rule has no application in civil cases.¹⁴³ The court offered no explanation why this must be so, except to note that the United States Supreme Court has specifically limited the exclusionary rule to criminal trials—under federal law, the exclusionary rule is not applicable in probation or parole proceedings, grand jury matters or civil tax cases.¹⁴⁴ The court, in short, saw “no reason to apply the [exclusionary rule] to [license revocation] hearings.”¹⁴⁵

Let's set aside the question whether the legality of the stop should play a role in license revocation proceedings, and focus instead on the New Hampshire Supreme Court's broader pronouncement in *Lopez*—that the application of the exclusionary rule under the state constitution will be limited to criminal cases. As an initial matter, the *Lopez* court erred in relying on federal precedent: the reason why the federal exclusionary rule is not applicable in probation or parole proceedings, or grand

¹³⁸ *Id.* at 449.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 450. To support this conclusion the court relied, among other sources of authority, upon the Supreme Court of Pennsylvania's decision in *Dep't of Transp. v. Wysocki*, 535 A.2d 77 (Pa. 1987), in which that court concluded that the constitutionality of a police roadblock had no bearing on the later validity of a license suspension. *Id.*

¹⁴³ *Lopez*, 761 A.2d at 450-51.

¹⁴⁴ *Id.* at 451.

¹⁴⁵ *Id.* (citing decisions of other state courts concluding that evidence inadmissible in a criminal proceeding still may be presented in a license revocation proceeding).

jury matters or civil tax cases, is because the United States Supreme Court has concluded that application of the rule in those situations would not serve to deter police misconduct,¹⁴⁶ the rationale for the federal rule.¹⁴⁷ And we know that the New Hampshire Supreme Court in *Canelo* discounted the deterrence rationale as a central basis for the exclusionary rule; deterrence could not, after that case, be considered as the animating rationale for the exclusionary rule under the state constitution.¹⁴⁸

Whether the *Canelo* court adopted an expressive approach to the exclusionary rule is doubtful in light of *Lopez*. As discussed above,¹⁴⁹ the *Canelo* court arguably premised its understanding of the exclusionary rule on the view that, given the constitutional importance of an individual's information privacy, an unwarranted incursion into that privacy by the government had to be met with a condign response—namely, the suppression of the wrongfully seized evidence. The *Lopez* court undermined that reasoning by acknowledging the potential illegality of the search and then denying the expressive power of the government's illegal conduct—denying, that is, the disrespect the use of the wrongfully seized evidence shows the search victim in the license revocation proceeding. In so doing, the court implicitly rejected the expressive rationale, for the intensity of the expressive injury to the search victim does not depend upon whether the context is civil or criminal—the disrespect shown the search victim's privacy by the government would be the same regardless of the context.

As with *Edmunds*, it appears that the expressive rationale does not offer the best explanation for the court's understanding of the exclusionary rule.¹⁵⁰ Rather, it seems likely, based upon

¹⁴⁶ See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 367 (1998) (concluding that “[t]he deterrence benefit of the exclusionary rule [in probation and parole hearings] would not outweigh the costs”).

¹⁴⁷ *Id.* at 362 (stating that the exclusionary rule applies “only in contexts ‘where its remedial objectives are thought most efficaciously served’” (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974))).

¹⁴⁸ See *State v. Canelo*, 653 A.2d 1097, 1105 (N.H. 1995) (stating that deterrence of police misconduct is not the exclusionary rule's “sole purpose”).

¹⁴⁹ See *supra* notes 124-28 and accompanying text (discussing expressive rationale in the context of *Edmunds* and *Canelo*).

¹⁵⁰ Just for the record, neither the judicial integrity rationale, nor either version of the separation of powers rationale, would support the results in *Hughes* and *Lopez*. Both

the decisions in *Edmunds* and *Canelo*, that the high courts of Pennsylvania and New Hampshire were sure only that they disagreed with the United States Supreme Court's decision in *Leon*, in which the Court adopted the good faith exception to the federal exclusionary rule, and were not prepared to address the substance or the logical extent of non-deterrence based approaches to the exclusionary rule. Such state constitutional decision-making—reactive and essentially incompletely-theorized—leads, at a minimum, to the potential for inconsistency in future cases, as both *Hughes* and *Lopez* demonstrate. There are of course other consequences as well.

III. THE CONSEQUENCES OF INCOMPLETELY THEORIZED STATE CONSTITUTIONAL DECISION-MAKING

Negative consequences flow from reactive and incompletely theorized state constitutional decision-making. First, these decisions contribute little to constitutional discourse about the meaning of individual rights protections and how they ought to be applied. Second, these decisions fail to provide appropriate guidance to private and public actors about the reach of individual rights protections and the correlative authority of states to exercise the police power in ways that implicate those protections.

A. Contributing to Constitutional Discourse

In every case involving a protection common to both the federal and state constitutions a state court may contribute to the discourse about societal commitments to such values as equality, due process, free expression, and the freedom from

Hughes and *Lopez* would run afoul of the judicial integrity rationale by realizing the judicial approval of "a manifest neglect . . . of the prohibitions of the Constitution." *United States v. Weeks*, 232 U.S. 383, 394 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961). In addition, neither instance of government conduct could be considered in accord with the principle that the police, absent exigent circumstances, seek antecedent justification for a search. See *Lynch*, *supra* note 81, at 738. Finally, neither case applied the separation of powers principle that the judiciary, when faced with "governmental actors . . . doing something repugnant to the constitution," must invalidate that conduct, regardless of the purported "costs" associated with such invalidation. *Schrock & Welsh*, *supra* note 82, at 347.

unreasonable searches and seizures.¹⁵¹ Judges, advocates, and commentators participate, via judicial opinions, legal briefs, and scholarly articles, in this discourse by advancing various arguments about the meaning of a constitutional provision or about the application of constitutional doctrine.¹⁵² What we call constitutional law is derived from this discourse, from the arguments that persuade and convince; indeed, "constitutional discourse," as James Gardner has observed, "is generally the only means by which positive constitutional law is made, other than by adopting or amending a constitution."¹⁵³

As a general matter, the United States Supreme Court feeds our constitutional discourse—the Court's decisions are its primary subject, or at least the point from which debates about constitutional meaning and the application of doctrine proceeds. This is to be expected when the Court has the final word in respect to the interpretation and application of the provisions of the United States Constitution.¹⁵⁴ But though its determinations are definitive as to federal law, the Court has no monopoly on interpretive judgments about the meaning of constitutional text: a determination by the Supreme Court does not necessarily represent a superior interpretation or application of a constitutional command.¹⁵⁵ As Justice Robert Jackson famously put it, the "[Court is] not final because [it is] infallible, but . . . infallible only because [it is] final."¹⁵⁶

Like their federal court brethren, state court judges hear constitutional challenges to government action that allegedly

¹⁵¹ See Friedman & Baron, *supra* note 5, at 128 (discussing the importance of state court contributions to constitutional discourse).

¹⁵² See ANTHONY G. AMSTERDAM AND JEROME BRUNER, *MINDING THE LAW* 173 (2000) (describing legal discourse in the litigation context as a contest of arguments about interpretation). Justice Felix Frankfurter observed, in a different context: "without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458-59 (1959) (Frankfurter, J., dissenting).

¹⁵³ Gardner, *supra* note 5, at 769.

¹⁵⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (stating that the Court has "primary authority" to interpret the Federal Constitution).

¹⁵⁵ See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 176 (1998) (suggesting that when federal and state constitutional interpretations diverge, "it may be that one of the interpreters has interpreted the pertinent constitutional provision wrongly").

¹⁵⁶ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

infringes individual rights and liberties, and they do so in the context of cases and controversies—in the context, that is, of actual disputes about the validity of government action, as framed by factual records developed at the trial level and by the arguments of advocates on either side of the issue. These are the familiar attributes of appellate decision-making in American courts, common to both the federal and state systems.¹⁵⁷

Similarities in perspective, however, are not merely a product of the contours of appellate practice and procedure. In resolving an individual rights challenge to government action, the justices of the state high courts, no less than their federal counterparts, must appreciate the outer limits of a judicial role defined in large part by institutional arrangements that favor regulation through the processes of representative—and, in many states, direct—democracy.¹⁵⁸ Though judicial selection processes may differ between the federal and state systems and from state to state, the judges who sit on state courts, too, must reckon with the counter-majoritarian difficulty and temper the exercise of their discretion with a concern to avoid judicial overreaching when the matter before the court implicates the validity of majoritarian preferences.¹⁵⁹

In view of this shared perspective, state courts may contribute to constitutional discourse on individual rights in at least two ways. First, state constitutional decisions may provide a first look at the interpretive possibilities that lie in a constitu-

¹⁵⁷ This is so even in states in which the courts may render advisory opinions when requested by the legislature or the executive; though in such instances a court's determination will have no immediate effect upon one or more citizens, still the courts invite arguments from all parties interested in the constitutional inquiry submitted. *See, e.g.*, Opinion of the Justices to the Senate, 484 N.E.2d 95, 98 (Mass. 1985) (defining focus of advisory opinion by reference to issues raised in briefs submitted).

¹⁵⁸ The institutional arrangements of state governments may differ from the federal constitutional structure in regard to features like direct democracy and the line item veto by the executive, but state constitutions generally do not deviate from the core aspects of the three-branch model established in the original state constitutions. *See* Rogan Kersh et al., "More a Distinction of Words Than Things": *The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 14 (1998) (discussing three-branch model in the original state constitutions).

¹⁵⁹ *See, e.g.*, Jeffrey L. Amestoy, *Foreword: State Constitutional Law Lecture: Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249 (2004) (discussing the role of state supreme courts vis-à-vis constitutional authority).

tional provision, or in an area of constitutional law where the application of traditional doctrinal principles remains unsettled. Consider the question of the constitutionality of prohibitions on same-sex marriage: in *Baker v. State*,¹⁶⁰ *Goodridge v. Department of Public Health*,¹⁶¹ and *Lewis v. Harris*,¹⁶² the state supreme courts of Vermont, Massachusetts, and New Jersey, respectively, concluded that such prohibitions lacked a rational basis under state equal protection principles. In these cases, the state courts took seriously the task of defining the parameters of equal protection doctrine in the context of laws that implicated important personal interests,¹⁶³ and these cases will serve as touchstones for state and federal courts addressing similar issues.

Such judicial reliance is not hypothetical. The *Goodridge* court expressly considered *Baker* and the reasoning of the Vermont Supreme Court in interpreting and applying the Massachusetts Constitution,¹⁶⁴ and the *Lewis* court similarly considered *Goodridge*.¹⁶⁵ Even the United States Supreme Court—certain members of which have criticized reliance upon comparative judicial experiences for guidance¹⁶⁶—has turned to the experience of state courts when addressing the scope of federal constitutional commitments to individual rights like due process and equal protection.¹⁶⁷ In *Nollan v. California Coastal Commission*,¹⁶⁸ for example, the Court relied upon a state constitu-

¹⁶⁰ 744 A.2d 864 (Vt. 1999).

¹⁶¹ 798 N.E.2d 941 (Mass. 2003).

¹⁶² 908 A.2d 196 (N.J. 2006).

¹⁶³ See Lawrence Friedman, *Public Opinion and Strict Scrutiny Equal Protection Review: Higher Education Affirmative Action and the Future of the Equal Protection Framework*, 24 B.C. THIRD WORLD L.J. 267, 280-82 (discussing *Baker* and *Goodridge*).

¹⁶⁴ See *Goodridge*, 798 N.E.2d at 957 (discussing Vermont Supreme Court's decision in *Baker*).

¹⁶⁵ See *Lewis*, 908 A.2d at 219-20 (discussing Massachusetts Supreme Judicial Court's decision in *Goodridge*).

¹⁶⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (criticizing the Court's discussion of "foreign views" in determining the constitutionality of prohibitions on homosexual sodomy as "[d]angerous dicta").

¹⁶⁷ See 1 DAVID O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENT ACCOUNTABILITY* 97 (6th ed. 2005) (reviewing the way in which the United States Supreme Court has taken judicial notice of "comparative laws and experiences").

¹⁶⁸ 483 U.S. 825 (1987).

tional takings analysis to establish the limits of permissible land use regulation under the United States Constitution.¹⁶⁹

The second way in which state courts may contribute to constitutional discourse on common individual rights protections is through the productive use of opportunities to consider anew those constitutional provisions or doctrines whose meaning in federal law may be viewed as reasonably settled. These are the cases that supply a forum for additional inquiry into the balance between individual rights and democratic-majoritarian concerns, and whether the United States Supreme Court has got the balance right.¹⁷⁰ To the extent a state court commits to articulating the rationale that supports its substantive disagreement with the result in a federal constitutional case concerning a parallel individual rights protection, the state decision will yield insights into how best to interpret and apply the constitutional provision in question—how best, that is, to reconcile an individual right with contrary majoritarian desires.¹⁷¹

When a state court provides a reasoned explanation for the basis of its disagreement with the United States Supreme Court in respect to the scope of an individual constitutional right, the court effectively registers what James Gardner has called a “public dissent” from a decision of the United States Supreme Court.¹⁷² Dissent, as Cass Sunstein has explained, is particularly important in judicial decision-making because adherence to the doctrine of stare decisis may result in a court’s failure to consider that a prior judgment may have been an aberration,

¹⁶⁹ See *id.* at 837 (citing *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12 (N.H. 1981)).

¹⁷⁰ See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147-48 (1993) (suggesting that “constitutionalism is not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order”); cf. Stephen E. Henderson, *Learning From All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 374 (2006) (expressing “hope that analysis of state constitutional law will influence the United States Supreme Court”).

¹⁷¹ The same reasoning applies when a state court decision is in agreement with a federal decision on the same issue—a valuable contribution to constitutional discourse may be made in instances in which a state court confirms that the United States Supreme Court’s understanding of an individual rights provision is the best available.

¹⁷² Gardner, *supra* note 12, at 1033.

rather than the product of reason and logic.¹⁷³ A substantive dissenting opinion may serve to deter future reliance on the arguably erroneous decision-making of previous courts,¹⁷⁴ and dissenting views accordingly may serve to prevent future, erroneous constitutional interpretations and applications.¹⁷⁵ For purposes of constitutional discourse, state court opinions on individual rights matters may, as Gardner has concluded, "influence[] long-term public understandings of the appropriate content of constitutionally guaranteed rights."¹⁷⁶

It is in this respect that *Edmunds* and *Canelo* disappoint. The problem is not the state courts' disagreement with the United States Supreme Court per se; rather, it is the failure of each court to articulate a coherent rationale for its understanding of the exclusionary rule and why that understanding leads logically to rejection of the good faith exception. In *United States v. Leon*,¹⁷⁷ the Supreme Court made patent its rationale for the exclusionary rule, focusing on deterrence as a guide to the rule's application: *Leon* teaches that a cost-benefit assessment of the possible deterrent effect of suppressing evidence, rather than a balancing of constitutional interests, should be utilized to determine whether the exclusionary rule applies in particular circumstances.¹⁷⁸

In neither *Edmunds* nor *Canelo*, by contrast, did the court provide such specific normative grounding in support of its understanding of the exclusionary rule. Though both courts explicitly rejected the deterrence rationale and adverted to the constitutional importance of individual privacy interests, neither ven-

¹⁷³ See CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 59 (2003). This is so regardless of whether a court in a particular case adheres to a narrow form of stare decisis, pursuant to which the court regards itself as obligated to follow the decisions of certain courts, or the court adheres to a more relaxed stare decisis, which looks to bring guidance from the decisions of other courts. See RONALD DWORKIN, LAW'S EMPIRE 25 (1986) (comparing "strict" and "relaxed" forms of stare decisis).

¹⁷⁴ See SUNSTEIN, *supra* note 173, at 176-77. Sunstein points to studies demonstrating that a diversity of viewpoints among judges tends to prevent errors in much the same way it does in other situations in which further information leads to principled decision-making. See *id.*

¹⁷⁵ See SUNSTEIN, *supra* note 13, at 27.

¹⁷⁶ Gardner, *supra* note 12, at 1033.

¹⁷⁷ 468 U.S. 897 (1984).

¹⁷⁸ *Id.* at 922.

tured an alternative explanation for the operation of the exclusionary rule under state law. As discussed above, the opinions in *Edmunds* and *Canelo* can tolerably be read as following the expressive approach to the exclusionary rule, pursuant to which there can be no exception for unauthorized searches undertaken by police officers in good faith.¹⁷⁹ But even accepting that the expressive rationale underlies those decisions, subsequent cases suggest that rationale will not inform the application of the exclusionary rule in Pennsylvania and New Hampshire outside the context of searches purportedly undertaken in good faith. Indeed, in *Lopez*, the New Hampshire court appeared willing to embrace the pragmatic approach it dismissed in *Canelo* when it concluded the exclusionary rule does not apply in civil cases.¹⁸⁰

Absent the articulation of a coherent theory to explain how the exclusionary rule should be understood and applied, the decisions in *Edmunds* and *Canelo* cannot function effectively as public dissents to *Leon*; they represent nothing more than mere expressions of disagreement with the result in *Leon*. Commentators have criticized *Leon* and the deterrence rationale,¹⁸¹ but alternative theories that address the application of the exclusionary rule, produced by state judges acting under institutional limits similar to those that constrain the Justices of the United States Supreme Court, are more likely to be persuasive in future cases involving the rule's scope. For it is in state court decisions that endeavor to explain such alternative theories that lawyers and judges are likely to discover the bases upon which they may explore and exploit skepticism about the work of previous courts—including the United States Supreme Court—and develop the arguments that may well prevent the perpetuation of undistinguished lines of constitutional argument.

¹⁷⁹ See *supra* notes 124-29 and accompanying text (arguing that the expressive rationale best explains the reasoning and result in *Edmunds* and *Canelo*).

¹⁸⁰ See *Lopez v. Dir.*, N.H. Div. of Motor Vehicles, 761 A.2d 448, 450 (N.H. 2000).

¹⁸¹ See, e.g., Bloom, *supra* note 29, at 467-71 (criticizing the abandonment of judicial integrity as the rationale underlying the exclusionary rule); Kamisar, *supra* note 29, at 163 (criticizing the cost-benefit exclusionary rule analysis embraced in *Leon*).

B. Providing Guidance in a State System

The cases are legion in which we wish a court had, all things considered, said a bit more about a particular result, or provided more detailed reasons for the adoption of a particular doctrinal rule.¹⁸² Losing parties, obviously, would prefer a reasoned explanation for why their arguments failed to persuade.¹⁸³ But the negative consequences of reactive, under-theorized state constitutional decisions extend beyond the mystery of a loss in an appellate court.

Reactive and incompletely theorized state constitutional decisions deny at least two groups appropriate guidance: those individuals who are trying to plan their affairs, and those who must, in the course of their official duties, determine the law's reach.¹⁸⁴ The first group includes the private citizens who seek to rely upon a judicial decision to clarify the breadth of the legal regulation of a constitutional protection—anyone, that is, who, in order to make informed choices in life, would be helped by knowing the law's bounds and how those bounds might affect a given choice. Individuals contemplating the purchase of residential real estate, for example, would benefit by knowing whether the property in which they are interested may be taken by the state or local government, consistent with the Fifth Amend-

¹⁸² See Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2007 (2005) (opining, in respect to minimal decision-making by the United States Supreme Court, that there "exists the danger that the Court will say too little").

¹⁸³ See Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 307 (1990) (stressing the importance of parties' understanding of rulings against them).

¹⁸⁴ SUNSTEIN, *supra* note 13, at 48 (explaining that costs associated with shallow decision-making are "faced by those who are trying to plan their affairs and who must try to figure out what the law will ultimately be"). See also Michel Rosenfeld, *Autopoiesis and Justice*, 13 CARDOZO L. REV. 1681, 1701 (1992) ("The greater the certainty that a social actor has concerning the expectations of all concerned, the more insurance that actor has concerning the consequences of his or her dealings with others."); Frederick Schauer, *Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 48-49 (2006) (arguing that "the domain of rights is . . . highly consequential both to the rights holders and to the policies that rights constrain").

ment¹⁸⁵ and its state constitutional equivalents,¹⁸⁶ to promote economic development.¹⁸⁷

The second group includes public officials who have some obligation to determine the law's limits as best they are able. When addressing issues related to proposed changes in a regulatory scheme or to the enforcement of existing regulations, state and local legislative representatives and executive officers must take account of any constitutional ruling that affects the limits of permissible government action.¹⁸⁸ As well, lower court judges must attempt to chart the reach of a state constitutional decision that alters the balance between state authority and a particular individual rights protection.¹⁸⁹ Incompletely theorized constitutional decisions tend to exacerbate problems of interpretation and application in areas of the law, like criminal procedure, where there exists a great deal of complex and often conflicting precedent in respect to issues commonly raised in state courts.

Consider again the Pennsylvania and New Hampshire exclusionary rule cases. The lack of clarity as to the underlying rationale for the exclusionary rule and the rejection of the good faith exception in *Edmunds* led, at a minimum, to questions in the lower courts and arguments by lawyers about the effect of that rejection in instances involving police determinations of apparent authority.¹⁹⁰ And, in light of the *Canelo* court's unadorned reliance upon notions of privacy in rejecting the good faith exception to the exclusionary rule, the trial court in *Lopez*

¹⁸⁵ The Fifth Amendment provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

¹⁸⁶ See, e.g., CONN. CONST. art. I, § 11 ("The property of no person shall be taken from public use, without just compensation therefor:").

¹⁸⁷ See *Kelo v. City of New London*, 545 U.S. 469 (2005) (sanctioning municipal exercise of eminent domain power for public purpose of economic development).

¹⁸⁸ See Siegel, *supra* note 182, at 2006.

¹⁸⁹ See Jeffrey R. Rosen, *The Age of Mixed Results*, NEW REPUBLIC, June 28, 1999, at 43 ("When the Supreme Court issues terse opinions whose reasoning is hard to discern, it compounds the confusion of inferior courts in precisely those cases where the relevant actors are pleading for a clear resolution.").

¹⁹⁰ See *Commonwealth v. Hughes*, 836 A.2d 893, 902-03, 903 n.8 (Pa. 2003) (discussing interaction between the exclusionary rule and apparent authority exception and lower court treatment of same).

understandably concluded that nothing ought to preclude the application of the exclusionary rule in civil proceedings under the state constitution.¹⁹¹

Had they read the decisions in *Edmunds* and *Canelo*, Mr. Hughes and Mr. Lopez (and their attorneys) could be forgiven for believing they possessed a constitutionally-protected interest in government compliance with the preconditions to a valid search and seizure, an interest that would be honored regardless whether a companion had apparent authority to waive such compliance, or whether that interest was implicated in circumstances that did not involve the possibility of criminal punishment. Indeed, state and local legislators and enforcement officers plausibly might have believed likewise. But that interest, to the extent it ever existed, proved ephemeral, lost in the space between the privacy that the Pennsylvania and New Hampshire Supreme Courts assured us their constitutional exclusionary rules protected, and those courts' incomplete explanations of how that could be.

IV. OVERCOMING THE JURISPRUDENTIAL CONCERNS THAT LEAD TO INCOMPLETELY THEORIZED DECISION-MAKING

Institutional factors may account for an incompletely theorized state constitutional decision: state supreme courts generally have larger dockets and fewer law clerks than the United States Supreme Court, and state court justices who are directly accountable to the electorate may have a greater hesitance to commit to fully theorized constitutional decisions.¹⁹² Apart from

¹⁹¹ See *Lopez v. Dir., N.H. Div. of Motor Vehicles*, 761 A.2d 448, 450 (N.H. 2000) (discussing trial court conclusion as to applicability of the exclusionary rule).

¹⁹² See, e.g., F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 206 (1999) ("Knowledge of how court decisions will affect powerful groups narrows the range of likely rulings by the [elected judge]."). Also, it simply may not occur to the court in a given case to undertake a deeper explanation of the theory underlying their interpretation of a specific individual rights provision or application of doctrinal rules—perhaps precedent cases, federal and state, did not suggest a theoretical thread to be explored; or perhaps counsel did not propose rationales for either amplifying or distinguishing the facial understanding of those precedent cases. See, e.g., *Jenkins v. Chief Justice of the Dist. Court Dep't*, 619 N.E.2d 324, 334-35 (Mass. 1993) (rejecting, following a survey of state authorities, the United States Supreme Court's rule that forty-eight hours provides reasonable time in which to complete arrest procedures).

those institutional limitations, it may be that an incompletely theorized decision is the result of a jurisprudential choice. Commentators have identified several jurisprudential concerns that plausibly explain why, in a given case, the United States Supreme Court might prefer an incompletely theorized rationale for its decision; the question upon which I focus here is whether these concerns apply equally to state courts deciding similar issues under their states' constitutions—and whether, even if those concerns are legitimate in the state constitutional context, they are outweighed by the value of state court contributions to constitutional discourse and the practical importance of providing guidance about the limits of a state's authority in respect to the scope of individual rights protections.

A. The Jurisprudential Concerns

The United States Supreme Court's hesitance to expound either a theoretical exploration of constitutional meaning or a rationale for a doctrinal rule or standard established to govern the application of a constitutional command may reflect one or more of several jurisprudential concerns. First, the Court's hesitance may reflect a strategic concern: an incompletely theorized decision acknowledges the anxieties associated with decision-making on a national scale—with the Court's exposition of doctrines and standards that will have equal force in politically, culturally, and geographically distinct regions of the country.¹⁹³ Second, it may reflect a concern to avoid internal conflict: an incompletely theorized decision acknowledges that the Justices must often compromise when they disagree about the basis for particular outcomes or about the meaning of the more abstract commitments to individual rights protections.¹⁹⁴ Finally, it may reflect a concern to avoid unnecessarily broad lawmaking: an

¹⁹³ See Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 974-75 (1985); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 396-97 (1984).

¹⁹⁴ See SUNSTEIN, *supra* note 13, at 11-13.

incompletely theorized decision acknowledges a desire to expand legal doctrines incrementally.¹⁹⁵

The strategic concern is not at work in the state courts. As Lawrence Sager has noted, the United States Supreme Court "has concerns of judicial management that are more extreme than comparable problems within state judiciaries; and these management concerns interact unhappily with the diversity of settings in which the rules established by the Court must operate."¹⁹⁶ At a minimum, state supreme courts do not face the strategic need to create rules that function equally well in the union's fifty states. To illustrate, Sager points to the United States Supreme Court's conclusion, in *San Antonio Independent School District v. Rodriguez*,¹⁹⁷ that it would not be advisable to attempt to articulate an equal protection rule applicable to public school financing challenges throughout the nation.¹⁹⁸ State court judges do not confront that problem when addressing similar challenges under state constitutions.¹⁹⁹

At the same time, a concern to manage internal disagreement about textual meaning or underlying rationales for doctrinal choices would seem to be one state high courts face in much the same way as the United States Supreme Court. Incompletely theorized decision-making in the Supreme Court, as Sunstein has argued, may reflect both harmony among members of the Court on concrete particulars and disagreement

¹⁹⁵ See *id.*

¹⁹⁶ Sager, *supra* note 193, at 974.

¹⁹⁷ 411 U.S. 1 (1973).

¹⁹⁸ See, e.g., *id.* at 55 (stating that the Court should not assume "a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested").

¹⁹⁹ See, e.g., *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (challenge to financing of public education under Connecticut Constitution); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997) (challenge to financing of public education under New Hampshire Constitution); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (challenge to financing of public education under New Jersey Constitution); *Brigham v. State*, 692 A.2d 384 (Vt. 1997) (challenge to financing of public education under Vermont Constitution); see also Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281 (1998) (discussing cases and offering critical assessment).

about the underlying basis for those particulars.²⁰⁰ In such an environment, judicial decisions will be constructed around the basic principles upon which a majority can agree.²⁰¹ This phenomenon is not unique to the Supreme Court: even in courts with fewer members there will be disagreements about the implications and consequences of abstract rationales.²⁰² Reflecting upon his time as an associate justice of the Massachusetts Supreme Judicial Court, Francis O'Connor observed: "Each of the justices was brought up in a different kitchen, so to speak, with the result that the justices do not think alike about a lot of issues."²⁰³

Similarly, a concern to avoid unnecessary rulemaking will likely find purchase in state courts. These courts are common law courts, after all, and disposed in practice to treat constitutional law as a species of common law—like the United States Supreme Court, state courts are often interpreting cases about constitutional text, and not the text itself, in an effort to derive and apply governing standards and rules.²⁰⁴ This approach results in decisions that tend to eschew fully articulated explanations for doctrinal choices; a relatively small expansion of the protection against unreasonable searches and seizures, for example, may be accomplished without engaging in a deep analysis of the underlying rationale simply by comparing analogous—or differing—factual circumstances.²⁰⁵

²⁰⁰ See SUNSTEIN, *supra* note 13, at 11. Sunstein's view of incompletely theorized decision-making in the United States Supreme Court, as an aspect of what he calls judicial "minimalism," has not gone unchallenged. *Cf.*, Siegel, *supra* note 182, at *passim* (arguing that Sunstein's account of United States Supreme Court decision-making is neither descriptively nor normatively accurate).

²⁰¹ See SUNSTEIN, *supra* note 13, at 14 (arguing that incompletely theorized decision-making seeks to avoid potentially controversial "foundational issues if and to the extent" possible).

²⁰² See, e.g., *State v. Canelo*, 653 A.2d 1097, 1111-12 (N.H. 1995) (Thayer, J., dissenting) (criticizing majority's understanding of the rationale for state exclusionary rule).

²⁰³ Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping With Dissent*, 83 MASS. L. REV. 93, 94 (1998).

²⁰⁴ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (discussing and advocating common law approach to constitutional decision-making).

²⁰⁵ See, e.g., *Commonwealth v. McCarthy*, 705 N.E.2d 1110 (Mass. 1999) (protection against unreasonable searches and seizures under state constitution turns on whether parking space is within apartment's curtilage). See also EDWARD F. HENNESSEY, JUDGES

B. Responding to the Jurisprudential Concerns

Though the first jurisprudential concern—the consequences of lawmaking on a national scale—need not detain a state court, state supreme court justices legitimately may be inclined to avoid both internal conflict and unnecessarily broad decision-making by refraining from articulating completely theorized justifications for constitutional rulings.²⁰⁶ Notwithstanding the force of these concerns, however, the question remains whether the desire to avoid these issues by crafting an incompletely theorized decision is outweighed by both the latent expectation in our federalist system that the court will contribute to constitutional discourse on individual rights issues and the practical need for constitutional guidance within a state legal system.

The normative expectation that state courts will contribute to constitutional discourse derives from the structural design of the republic and its dual political capacities, federal and state.²⁰⁷ Among other ends, the Framers desired this governmental arrangement to enhance and protect individual liberties through the availability of multiple governmental authorities to check and balance one another.²⁰⁸ State courts can fulfill this checking and balancing function for the citizens of their state by interpreting their state constitutions independently of federal precedent in cases involving common individual rights protec-

MAKING LAW 9-10 (1994) (discussing the importance and difficulty from judicial perspective of identifying controlling principles in a line of cases).

²⁰⁶ Apart from these jurisprudential concerns, there is the possibility that simple justice is all the circumstances of a case require—a decision righting an obvious wrong, or affirming the trial court's inclination to do the same. In these rare instances, the state court need not write an elaborate opinion explaining its decision to affirm or reverse the lower court's judgment. See SUNSTEIN, *supra* note 13, at 15 (discussing circumstances in which reason for decision is not necessary).

²⁰⁷ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (discussing the Framers' decision to "split the atom of sovereignty").

²⁰⁸ See THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (arguing that system of dual sovereignty provides "double security" to the people); see also Daniel J. Elazar, *Opening the Third Century of American Federalism: Issues and Prospects*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 14 (1990) (arguing that federalism provides "useful redundancy and fail-safe mechanisms, so that when one part of the political system cannot function, other parts can take over"); Kathleen M. Sullivan, *The Balance of Power Between the Federal Government and the States*, in NEW FEDERALIST PAPERS 111, 112-13 (Alan Brinkley, et al. eds., 1997) (discussing the constitutional division of power as protecting liberty and the public good).

tions, relying upon such precedent for guidance as they would any persuasive case from another jurisdiction. When independent state constitutional interpretation expands the compass of an individual right, the rejection of federal precedent serves to cabin the authority of state (and local) government in circumstances in which federal law would not: this is the second political capacity, in the form of a state court implementing the state constitution, at work.

But only when a state constitutional decision explains the basis for disagreement with the United States Supreme Court does the state court effectively exert its influence consonant with the role of the states in our federal system. In other words, only when a decision presents a fully theorized alternative does it offer more than the possibility of a redundant protection for the citizens of a state in the circumstances of that case; in the completely theorized decision lies the basis for challenging the way in which individual rights protections are implemented under other states' constitutions.²⁰⁹ Differing assessments of the nature of individual rights commitments by state courts provide us, in the spirit of Robert Cover's "polycentric norm articulation," with examples of how the relationship between government and citizen may be configured, and those arrangements may in the future—in judicial and legislative chambers alike—be profitably compared and contrasted with the federal model.²¹⁰

In addition to the expectation that state courts will fulfill the expectations of our federalist system, there is the practical need for guidance at the state level. Incompletely theorized decision-making leads to uncertainty about individual rights protections under the state constitution, which leads to uncertainty about the extent to which government can act in many areas.²¹¹

²⁰⁹ See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 133-35 (2006) (discussing the frequency with which state courts refer to the judgments of other states in constitutional and other matters); cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states in our federal system may serve as laboratories of democracy).

²¹⁰ See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 673-74 (1981) (discussing the "distinct advantages" in our federal system of "polycentric norm articulation").

²¹¹ See *supra* notes 182-89 and accompanying text (discussing need for guidance as to the limits of governmental authority).

To be sure, absolute certainty about the meaning of a constitutional protection or application of constitutional doctrine is not possible.²¹² Once a state court has determined that it disagrees with the United States Supreme Court, however, a well-theorized explanation for that determination will provide citizens and lawmakers with more guidance as to the bounds of state constitutional limitations on government power, and those citizens and lawmakers may then act with greater confidence as to the law's reach. As state court dockets continue to grow in relation to federal court dockets,²¹³ particularly in respect to criminal cases,²¹⁴ even another degree of certainty may be instructive.²¹⁵ Given that each new criminal case represents an opportunity to dispute the limits of government authority, such guidance could serve to deter frivolous individual rights claims—if not in state and federal courts, then in the halls of legislators and executive officers.²¹⁶

Judicial interest in internal harmony or incremental doctrinal growth may lead a state court to prefer not to supply a

²¹² I do not mean to suggest that completely theorized constitutional decisions could eliminate all future uncertainty; as Jerome Frank wisely noted, “no one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made.” JEROME FRANK, *LAW AND THE MODERN MIND* 6 (1949); see also TARR, *supra* note 155, at 181 n.32 (observing that, “given the Supreme Court’s well-documented difficulties in such fields as religious liberty and search-and-seizure,” there will always be an element of unpredictability in the application of individual rights doctrines).

²¹³ See RICHARD SCHAUFFLER ET AL., *EXAMINING THE WORK OF STATE COURTS, 2004: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13-15* (National Center for State Courts 2005) (reporting increase in state court cases).

²¹⁴ See Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agar, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL L. STUDIES 755, 757 (2004) (reporting that “state courts of general jurisdiction resolve nearly 28 times as many civil cases and 82 times as many criminal cases as do federal district courts”).

²¹⁵ Cf. Cass R. Sunstein, *Problems With Minimalism*, 58 STAN. L. REV. 1899, 1914 (2006) (advocating more completely theorized decision-making “[w]hen the area requires a high degree of predictability, and when the Court has had a great deal of experience with the area”).

²¹⁶ See Giuseppe Dari-Mattiacci & Bruno Deffains, *Uncertainty of Law and the Legal Process* 24 (George Mason University Law & Economics Research Paper Series, Working Paper No. 05-39, Dec. 7, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869368 (concluding that “the rate of litigation and the degree of uncertainty of a legal system are inherently related and one cannot control the former without affecting the latter and vice versa”); Hanssen, *supra* note 191, at 209 (concluding that “an increase in the uncertainty surrounding judicial decisions may be expected to raise the amount of litigation”).

completely theorized explanation for the rejection of federal precedent in an individual rights case. But the resulting decision will scarcely fulfill the normative expectation of state courts inherent in the federal constitutional structure. And the price for that jurisprudential choice will be increased uncertainty about constraints on state governments in respect to individual rights protections—a price that will be paid within and without the judicial system in more litigation and in potentially wasteful regulatory efforts.²¹⁷

V. TOWARD MORE COMPLETELY THEORIZED STATE CONSTITUTIONAL DECISION-MAKING

The burden of persuading state court justices to consider the benefits of more completely theorized individual rights decisions falls inevitably upon the lawyers who appear before them.²¹⁸ If a state court views as relevant to its work the jurisprudential concerns that lead to incompletely theorized decision-making, lawyers must take the hard road and seek to educate the justices about the benefits of developing completely theorized constitutional arguments. They must demonstrate that, to the extent the jurisprudential concerns that lead to incompletely theorized decisions are at play, those concerns should be balanced against the importance of contributing to discourse on the constitutional provision or doctrine at issue; and they must demonstrate to the court the practical importance of even a modestly more precise understanding of state law.²¹⁹

²¹⁷ See Dari-Mattiacci & Deffains, *supra* note 216, at 21 (“Uncertainty triggers . . . allocative costs, as the lack of certainty concerning legal entitlements distorts the process of resource allocation.”); see also *id.* at 25 (concluding that the cost of judicial law-making “is partially borne by taxpayers and partially spread among litigants in the form of lawyers’ fees and time spent dealing with the judicial system”).

²¹⁸ Law professors, it seems, have increasingly little direct influence in these matters. See Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, March 19, 2007, at A8.

²¹⁹ See, e.g., Louis Kaplow & Steven Shavell, *Legal Advice About Acts Already Committed*, 10 INT’L REV. L. & ECON. 149, 158 (1990) (concluding that, “if individuals know what legal rules will apply and the rules are properly enforced, their behavior will be affected by these rules”); see also *id.* at 159 (concluding that, when individuals have more information about legal rules and exceptions, “their choice of acts will be affected”); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litiga-*

As an initial matter, counsel need to develop the theoretical rationales that support more completely theorized individual rights decision-making. Persuading the lawyers in state constitutional cases to undertake this level of advocacy is not necessarily an impossible task. In matters involving individual rights, and particularly in the criminal context, the litigants are represented by counsel who are particularly attuned to the need for greater certainty and predictability in the law. These lawyers represent the judicial system's "repeat players," and they are most likely to have an interest in parsing precedent cases, state and federal, as well as relevant scholarly commentary, to discern or propose rationales that explain how doctrinal standards ought to be articulated and applied.²²⁰

Especially at the appellate level, these lawyers have an incentive to favor more refined development of theoretical rationales for individual rights doctrines. Defense counsel in cases implicating the exclusionary rule, for example, would likely prefer fewer and narrower exceptions to the rule. A call to the general interest in privacy may be tactically sufficient in one case to dissuade a state court from either adopting or applying an exception to the exclusionary rule—see *Edmunds* and *Canelo*. But legal doctrines in common law systems develop on a continuum, and a deeper theory of the privacy that the exclusionary rule serves to protect—based, perhaps, upon institutional compliance, judicial integrity, separation of powers, or expressive meaning—would provide a surer base from which to proceed in the next case.

State supreme courts have expressly acknowledged that it is the lawyers appearing before them who must lead the way. Indeed, some courts have issued instructions to lawyers urging them to develop fully theorized arguments when raising state constitutional claims in individual rights cases. In *State v. Jew-*

tion: Its Effects and Social Desirability, 102 HARV. L. REV. 565, 580-81 (1989) (discussing the value of legal advice in the litigation context).

²²⁰ See Ronald F. Wright, *When Do We Want Incomplete Agreements? A Comment on Sunstein's Holmes Devise Lecture*, 31 WAKE FOREST L. REV. 459, 465 (1996) (suggesting that governmental parties value clear guidance "because the institutions of government are more likely to be 'repeat players'").

ett,²²¹ the Supreme Court of Vermont lamented the parties' failure to present "any substantive analysis or argument" on the state constitutional claim, that the police had illegally stopped and arrested the defendant.²²² The court directed the parties to file supplemental briefs addressing the matter,²²³ and proceeded to offer practitioners a primer in the various modes of constitutional argument, from historical and textual arguments to arguments based upon precedent and policy considerations.²²⁴ The court emphasized the importance of developing arguments about the meaning and application of constitutional provisions which recognize that, as in federal constitutional law, text and external sources will often prove to be merely an analytical starting point for the conscientious judge.²²⁵

The Vermont court assumed that developing well grounded constitutional arguments is not beyond the competence of most attorneys. As Kris Franklin has observed, while theorizing involves "imagination, construction, [and] creativity,"²²⁶ law school is "awash in theoretical constructs, however unspoken."²²⁷ The kind of theoretical argument that state constitutional litigation requires is no different from that which law schools train students to appreciate and undertake as a matter of course, even if indirectly. It calls for a lawyer to bridge the gap between text and precedent by discerning the values—like democracy-reinforcement or efficiency—inherent in constitutional structures or history, and to imagine the effect on those values of various doctrinal moves in proposing an explanation for a holding that will continue to promote the substance of those values, and that will have relevance in factual circumstances as yet unknown.²²⁸

This kind of theorizing is within the grasp of professionals who have been trained to read texts and the cases interpreting

²²¹ 500 A.2d 233 (Vt. 1985).

²²² *Id.* at 234.

²²³ *Id.*

²²⁴ *Id.* at 236-37.

²²⁵ "One longs to hear once again of legal concepts," the court observed, "their meaning and origin." *Id.* at 235.

²²⁶ Kris Franklin, "Theory Saved My Life," 8 N.Y. CITY L. REV. 599, 600 (2005).

²²⁷ *Id.* at 608.

²²⁸ See *id.* at 610-11.

those texts closely, and to discern in those materials the discrete differences upon which convincing arguments are made. Some lawyers may be better at this work than others, but at bottom this is the object of the first year curriculum at most American law schools.

CONCLUSION

When a state supreme court considers an individual rights claim upon which the United States Supreme Court has passed, we have a sense that the court should explicate the basis for a difference of opinion over the meaning or application of a constitutional provision that is textually similar—that the state court should provide a deeper justification for a constitutional ruling than simple disagreement with a majority of the United States Supreme Court. There is nothing wrong with such disagreement, of course; the Supreme Court is not infallible. But, notwithstanding the immediate benefit to the winning party, state constitutional decisions that lack meaningful rationales for the court's interpretive and doctrinal choices are hollow: such decisions fail to contribute meaningfully to constitutional discourse and may well impede the efficient administration of justice.

The basis for more meaningful state court decision-making in individual rights cases lies in the constitutional arguments of lawyers: the advocates appearing before state high courts must advance arguments well grounded in theory, to the end of persuading state court justices, first, that they can and should participate in the larger discourse about the nature and effect of our foundational commitments to individual rights; and, second, that they can and should seek to provide citizens with sufficient guidance as to what the state constitution requires. Only when state courts are convinced of the value of this effort are we likely to see state constitutional decisions that contribute to a greater understanding of how the relationship between government and citizen may be configured, and that more explicitly address the limits of governmental authority where individual rights and liberties are concerned.

**“JOHN ADAMS MADE ME DO IT”*:
JUDICIAL FEDERALISM,
JUDICIAL CHAUVINISM, AND ARTICLE 14
OF MASSACHUSETTS’
DECLARATION OF RIGHTS****

*Joseph A. Grasso, Jr.****

“[T]he most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none.”¹

INTRODUCTION

“The question of whether, and under what circumstances, it is legitimate for state courts to reach conclusions under their state constitutions that are more protective of rights than United States Supreme Court decisions is one of the most important questions of American constitutional federalism.”² Whether and when a state’s constitution permits, indeed requires, departure from decisions of the United States Supreme Court lies at the heart of every judicial federalism debate.³

If a state court chooses to depart from United States Supreme Court jurisprudence, what is the basis for departure? Is

* Commonwealth v. Gonsalves, 711 N.E.2d 108, 123 (Mass. 1999) (Fried, J., dissenting).

** The Declaration of Rights consists of thirty articles set forth in Part 1 of the Massachusetts Constitution. MASS. CONST. pt. 1, arts. 1-30.

*** Justice of the Massachusetts Appeals Court. I owe much to the research assistance of my former law clerk, Christopher Lindstrom, Esquire, now of Nutter McLennan & Fish, LLP, 155 Seaport Boulevard, Boston, Massachusetts, and to Maggi Farrell, Esquire, of Boston for her thoughtful comments.

¹ Paul A. Freund, *Social Justice and the Law*, in SOCIAL JUSTICE 93, 110 (Richard B. Brandt ed., 1962).

² Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1018 (1997).

³ Judicial federalism has an inherent “one way” structural limitation. Any state variation must afford greater, not fewer, rights because the United States Constitution is the law of the land, binding on all.

the divergence a principled application of concepts of federalism by the third branch of government? Or is it idiosyncratic choice motivated by disagreement with federal law? Does the decision exemplify judicial federalism or judicial chauvinism⁴?

Most would agree that “it is not a good thing for judges to make law according to their personal prejudices, philosophies and predilections.”⁵ As a discipline against surrender to that temptation, legal and judicial scholars have suggested various methodologies for state constitutional adjudication. Commentators inquire whether a state court’s resort to, and interpretation of, its constitution is in lockstep with that of the United States Supreme Court,⁶ relies on a primary source approach,⁷ an interstitial approach,⁸ or is an expression of dual sovereignty.⁹ Like-

⁴ “Chauvinism: excessive devotion to any cause, esp. zealous and belligerent patriotism or blind enthusiasm for military glory.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989). As used herein, “judicial chauvinism” refers to unreasoned reliance by a state court on its own constitution rather than the United States Constitution as the basis for its decision.

⁵ EDWARD F. HENNESSEY, JUDGES MAKING LAW, at ix (1994).

⁶ The lockstep model generally follows United States Supreme Court statements of federal law when confronting a state constitutional challenge. Lockstepping itself comes in a variety of forms, encompassing “unreflective adoption” of federal law (applying federal analysis without acknowledging the possibility of a different outcome), “reflective adoption” (acknowledging and considering the possibility of a different outcome), and “prospective lockstepping” (announcing that federal and state interpretations will be the same in future cases as well as current). See Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1505-09 (2005).

⁷ The primary source, or self reliant approach, looks to the state constitution, not its federal counterpart, as the primary and independent source of rights. The primacy approach posits that the state court should base its decision on federal law only if a result grounded in state law falls below the standards of the Federal Constitution. See Robert A. Marangola, *Independent State Constitutional Adjudication in Massachusetts: 1988-1998*, 61 ALB. L. REV. 1625, 1629-31 (1998).

⁸ The interstitial, or supplemental, approach looks to federal constitutional principles first, deeming Supreme Court decisions presumptively valid and persuasive guidance even before considering the state constitution. *Id.* at 1630-31. Resort to the state constitution arises only if the federal interpretation is unclear or the federal claim fails. *Id.* at 1631. Under the interstitial model, once the court identifies reasons to diverge, the final question is how to proceed in elaborating the contours of a state constitutional doctrine—reactively (simply tinkering with available federal doctrine) or employing a more self-reliant approach (building independent state constitutional doctrine without reference to the federal doctrine). *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1358 (1982).

⁹ “The dual reliance or dual sovereignty method is one in which . . . the state court looks to both federal and state constitutional law in reviewing a case, even if the court

wise, judicial opinions limn the principles that underlie the determination to construe the state's constitution as affording rights and liberties beyond those guaranteed by the United States Supreme Court.¹⁰

Critics of methodologies that accept the federal rule as the norm challenge the assumption that the Federal Constitution can "somehow authoritatively set the meaning for similar provisions of state constitutions."¹¹ Is not a state judge's view as to what is "reasonable" just as valid as that of a United States Supreme Court Justice—particularly in the judge's own state? "[I]f there are divergent results in federal and state courts, why is one body of law less principled than another? Why should state courts not examine a federal decision to determine whether it is sufficiently persuasive to warrant adoption into state law?"¹² "A state high court has the duty, in interpreting the supreme law of the state, to adopt a reasoned interpretation of its own constitution despite what the United States Supreme Court has said when interpreting a different constitution under different institutional circumstances."¹³ Especially is this true in Massachusetts, where Article 14 (hereinafter art. 14) of the Declaration of Rights served as the model for the Fourth Amendment to the United States Constitution.

Among the first proponents of resort to state constitutional principles in Massachusetts was Justice Herbert P. Wilkins of the Supreme Judicial Court (SJC). In Justice Wilkins' view, the mere fact that the drafters of the United States Constitution chose to replicate the words of the Massachusetts Declaration of

decides the case solely on state constitutional grounds." Marangola, *supra* note 7, at 1631.

¹⁰ See, for example, the primacy or "first things first" approach espoused by Judge Hans A. Linde of the Oregon Supreme Court, or the criteria/categorical analysis undertaken by Justice Handler in *State v. Williams*, 459 A.2d 641 (N.J. 1983), and *State v. Hunt*, 450 A.2d. 952, 965-67 (N.J. 1982) (Handler, J., concurring). The criteria method posits that state constitutional interpretation should only diverge from its federal counterpart for specific reasons, including textual and structural differences, legislative history, preexisting state law, matters of particular state interest or local concern, state traditions, and distinctive attitudes of the state's citizenry. *Hunt*, 450 A.2d at 965-67.

¹¹ *Williams*, *supra* note 2, at 1046.

¹² Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1180 (1985).

¹³ *Williams*, *supra* note 2, at 1048.

Rights does not require Massachusetts, when interpreting its constitution, to walk in lockstep with the Supreme Court's interpretation of the Federal Constitution.¹⁴ "Such a view abdicates to the Court in Washington the responsibility of defining what is constitutionally proper; and, as the lack of unanimity on that Court shows, the determination of what is constitutionally appropriate often differs among reasonable people."¹⁵

Part I of this article focuses on the common constitutional DNA in art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution, the early development of the exclusionary rule, and the constitutionalization of criminal procedure in state criminal prosecutions. Part II explores *Commonwealth v. Upton*,¹⁶ the landmark decision of judicial federalism in Massachusetts' law of search and seizure. Part III examines two cases, *Commonwealth v. Gonsalves*¹⁷ and *Commonwealth v. Rodriguez*,¹⁸ as exemplifying the debate whether invocation of art. 14 is a pure policy judgment or a principled application of the SJC's independent authority to analyze its own state's constitution. Part IV surveys several Massachusetts search and seizure decisions to demonstrate that the SJC's methodology for applying state constitutional principles is far from uniform.¹⁹ Part V posits that the methodological label for assessing the resort to state constitutional principles is less important than whether the resulting decision is faithful to the manner in which judges should decide cases and make law.

¹⁴ Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, A Comparative Constitutional Analysis*, 14 SUFFOLK U. L. REV. 887, 921 (1980).

¹⁵ *Id.*

¹⁶ 476 N.E.2d 548 (Mass. 1985).

¹⁷ 711 N.E.2d 108 (Mass. 1999).

¹⁸ 722 N.E.2d 429 (Mass. 2000).

¹⁹ Roderick L. Ireland, *How We Do It In Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405, 409 (2004). "[T]he SJC has blended methodologies such as textual analysis, history, common law, structural differences, and comparison to other states." *Id.* "The loudest dissents have arisen when the SJC has attempted to determine constitutional 'standards of decency' for controversial issues." *Id.* at 418.

PART I: COMMON CONSTITUTIONAL DNA

A. *A Brief History Lesson*

The common provenance of art. 14 of the Massachusetts Declaration of Rights²⁰ and the Fourth Amendment to the United States Constitution²¹ bears on their scope. Each derives from the epochal argument of James Otis opposing the issuance of writs of assistance, a form of general warrants that authorized customs officers to enter and search buildings for smuggled goods. Otis considered the writ of assistance the “worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of the constitution, that ever was found in an English law book”²² because it placed the liberty of every man in the hands of every petty officer. John Adams enshrined Otis’ defense of privacy in the constitutional prohibition against unreasonable search and seizure—first in art. 14 of the Massachusetts Declaration of Rights (1780), and then in the Fourth Amendment to the United States Constitution (1791).²³

²⁰ Art. 14 states:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. Pt. 1, art. 14.

²¹ The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

²² See 2 LEGAL PAPERS OF JOHN ADAMS 140 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). See also *Jenkins v. Chief Justice of Dist. Court Dep’t*, 619 N.E.2d 324, 330 (Mass. 1993).

²³ See *Harris v. United States*, 331 U.S. 145, 157-58 (1947).

B. One Hundred and Seventy-Five Inglorious Years

For over 175 years, the common lineage of the Fourth Amendment and art. 14 was little more than an historical oddity. The United States Supreme Court and the Massachusetts Supreme Judicial Court took occasional note of the shared ancestry when interpreting their respective constitutions, but to little effect.

Of art. 14, the SJC observed: "With the fresh recollection of those stirring discussions [respecting the writs of assistance], and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures, was framed and adopted."²⁴

Similarly, the United States Supreme Court remarked: "The Fourth Amendment . . . derives from the similar provision in the first Massachusetts Constitution [art. 14 of the Declaration of Rights]. We may therefore look to the construction which the early Massachusetts Court placed upon the progenitor of the Fourth Amendment. . . ."²⁵

The development of the exclusionary rule as a deterrent to violations of the Fourth Amendment or art. 14 did not occur for well over a century. Moreover, the exclusionary rule initially arose in Massachusetts solely as a result of a federal, not state, constitutional mandate.

*C. Development of Massachusetts' Exclusionary Rule:
From "Three Blind Mice" to Commonwealth v. Upton*

Prior to *Mapp v. Ohio*,²⁶ the exclusion of illegally seized evidence in state prosecutions was not viewed as required by either the Fourth Amendment or art. 14. Indeed, in *Commonwealth v. Dana*,²⁷ which involved a prosecution for violation of a statute prohibiting lotteries, the SJC concluded that the use of illegally seized evidence in state prosecutions was consonant with art. 14. In admitting the offending lottery ticket and other unlaw-

²⁴ *Commonwealth v. Dana*, 43 Mass. 329, 336 (1841).

²⁵ *Harris*, 331 U.S. at 161 (quoting *Dana*, 43 Mass. at 336).

²⁶ 367 U.S. 643 (1961).

²⁷ 43 Mass. 329 (1841).

fully seized evidence, the SJC declared that it simply should not concern itself with how papers offered in evidence were obtained:

Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully ²⁸

Even as the United States Supreme Court began to develop a federal exclusionary rule for Fourth Amendment violations, the SJC continued to apply the no-exclusion principle of *Dana* in all manner of cases, including first degree murder prosecutions.²⁹ Thus, in *Commonwealth v. Wilkins*,³⁰ the SJC admitted the challenged evidence notwithstanding the unlawful manner of its seizure.³¹ Because the Fourth Amendment as yet had no applicability in state prosecutions, the SJC, as ultimate arbiter of the protections to be afforded in state prosecutions, was free to admit such evidence.

D. The Revolution of Mapp v. Ohio: A Merger of Federal Fourth Amendment Exclusionary Principles and State Prosecutions

The Warren Court's decision in *Mapp v. Ohio*³² heralded the federal constitutionalization of criminal procedure. Overruling *Wolf v. Colorado*,³³ *Mapp* extended Fourth Amendment protections (and the exclusionary rule) to state prosecutions as part of Fourteenth Amendment due process. No longer were states free to ignore the legality of a search and seizure in their criminal

²⁸ *Id.* at 337.

²⁹ *Commonwealth v. Wilkins*, 138 N.E. 11, 12 (Mass. 1923).

³⁰ *Id.*

³¹ *Id.*

³² 367 U.S. 643 (1961).

³³ 338 U.S. 25 (1947).

prosecutions. *Mapp* established a floor below which states must not fall in protecting the rights of their citizens, and provided a full fledged exclusionary rule for state violations of the Fourth Amendment.³⁴

1. The Warren Court Expansion

On the heels of *Mapp* followed a number of cases that extended other significant federal constitutional protections (under the Fifth and Sixth Amendments) to state criminal prosecutions: *Gideon v. Wainwright*³⁵ (providing indigents the right to trial counsel in felony cases); *Douglas v. California*³⁶ (providing indigents the right to counsel on appeal); *Escobedo v. Illinois*³⁷ (refusing request for lawyer during interrogation violates Sixth Amendment right to counsel); *Miranda v. Arizona*³⁸ (imposing requirements on custodial interrogations under Fifth Amendment); *Argersinger v. Hamlin*³⁹ (extending right to counsel to any offense, whether petty, misdemeanor, or felony); *Faretta v. California*⁴⁰ (guaranteeing criminal defendant right to self-representation under Sixth Amendment).

2. The Burger/Rehnquist Retrenchment

In law, as in physics, every action produces an equal and opposite reaction. Just as Franklin Delano Roosevelt's court-packing proposal emerged in response to the United States Supreme Court's consistent obstruction of needed social legislation,⁴¹ the Warren Court's constitutionalization of criminal pro-

³⁴ Viewed in broader scale, *Mapp* was part of the larger jurisprudential revolution that began in the United States in the 1930s and extended to all aspects of American life—economic, religious, educational and sexual. For example, no longer were states free to refuse to pay minimum wages mandated by the federal government, see *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), or to maintain segregated, but equal, education, see *Brown v. Board of Education*, 347 U.S. 483 (1954).

³⁵ 372 U.S. 335 (1963).

³⁶ 372 U.S. 353 (1963).

³⁷ 378 U.S. 478 (1964).

³⁸ 384 U.S. 436 (1966).

³⁹ 407 U.S. 25 (1972).

⁴⁰ 422 U.S. 806 (1975).

⁴¹ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny, in which the Supreme Court invoked substantive due process to invalidate the legislation. Such deci-

cedure evoked a call for retrenchment and for "strict construction."⁴² "In response, there emerged a number of closely divided decisions of the United States Supreme Court, such as *Harris v. New York*,⁴³ that answered the call for retrenchment."⁴⁴

3. Response to the Burger/Rehnquist Retrenchment: The Call for a New Judicial Federalism

While the Warren Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims, or judges their decisions, on state constitutional grounds. However, as the Burger/Rehnquist retrenchment proceeded, Justice William Brennan argued that the trend of recent Supreme Court civil liberties decisions

sions were widely criticized as an impermissible judicial intrusion into legislative value judgments. The furor abated when *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and *NLRB v. Jones & Loughlin Steel Corporation*, 301 U.S. 1 (1937), brought an end to "Lochnerism" and ushered in an era of self-imposed restraint by the Supreme Court in its constitutional review of acts of Congress and the state legislatures.

⁴² The tension extended beyond the criminal law to issues such as abortion rights and rights of sexual equality.

⁴³ 401 U.S. 222 (1971).

⁴⁴ In the wake of *Harris* followed numerous other cases that adopted a narrower constitutional view. See, e.g., *United States v. Patane*, 542 U.S. 630 (2004) (failing to give required *Miranda* warnings does not require suppression of fruits of unwarned, but voluntary, statements); *McNeil v. Wisconsin*, 501 U.S. 171 (1991) (holding Sixth Amendment right to counsel "offense-specific"); *California v. Hodari D.*, 499 U.S. 621 (1991) (rejecting *Mendenhall* "free to leave standard" for determining stop in the constitutional sense and substituting "application of physical force" or "show of authority to which subject yields"); *New York v. Harris*, 495 U.S. 14 (1990) (stating exclusionary rule does not bar use of defendant's statements made outside of home even though taken after arrest inside home in violation of *Payton* rule); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (concluding use of highway sobriety checkpoints does not violate Fourth Amendment); *Moran v. Burbine*, 475 U.S. 412 (1986) (holding that, under Fifth and Sixth Amendments, there is no duty to inform suspect of attorneys' efforts to render legal services when suspect had not personally requested representation); *United States v. Leon*, 468 U.S. 897 (1984) (upholding "good faith" exception to exclusionary rule for reasonable reliance on search warrant later found unsupported by probable cause); *Illinois v. Gates*, 462 U.S. 213 (1983) (rejecting *Aguilar-Spinelli* standard for determination of probable cause and imposing "totality of the circumstances" test); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (permitting warrantless inventory search of closed glove compartment in motor vehicle impounded for traffic violation); *United States v. Edwards*, 415 U.S. 800 (1974) (upholding warrantless seizure of clothing from arrestee ten hours after arrest); *Harris v. New York*, 401 U.S. 222 (1971) (holding statements given in violation of *Miranda* requirement inadmissible in case-in-chief, but admissible to impeach credibility).

should prompt a reappraisal of that strategy.⁴⁵ In what has been described as the "Magna Carta of state constitutional law,"⁴⁶ Justice Brennan opined that state constitutions have been, and continue to be, a source for greater protections than the United States Supreme Court has held are available under the Federal Bill of Rights.

[S]tate courts no less than federal are and ought to be guardians of our liberty. . . . [S]tate courts cannot rest when they have afforded their citizens the full protection of the federal constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.⁴⁷

PART II: JUDICIAL FEDERALISM IN MASSACHUSETTS:
INVOCATION OF ARTICLE 14 AS A SOURCE OF GREATER RIGHTS
THAN THOSE AFFORDED BY THE UNITED STATES CONSTITUTION

In response to Justice Brennan's clarion call, many states, including Massachusetts, began looking to their state constitutions as a source of rights greater than those afforded by the Federal Constitution.

A. *Early Ancestors*

Resort to state constitutional principles was not entirely novel in Massachusetts. As early as 1805, in *Mountfort v. Hall*,⁴⁸ "the power and duty of the court to declare laws unconstitutional was acknowledged, indeed assumed."⁴⁹ Similarly, in *Fisher v. McGirr*,⁵⁰ the SJC concluded that a statute authorizing

⁴⁵ See William J. Brennan, Jr., *State Constitutions and The Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁴⁶ Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

⁴⁷ Brennan, *supra* note 45, at 491.

⁴⁸ 1 Mass. (1 Will.) 443, 454 (1805).

⁴⁹ Wilkins, *supra* note 14, at 890.

⁵⁰ 67 Mass. (1 Gray) 1 (1854). *Fisher* involved an action for damages against a constable who, pursuant to a search warrant issued by a justice of the peace, entered Fisher's residence and seized "one half barrel of cherry brandy, one demijohn of brandy, one jug of New England rum, one bottle of New England rum, one bottle of gin and one bottle of brandy." *Id.* at 3 n.1.

the issuance of a search warrant was “contrary to the Declaration of Rights and the constitution of this Commonwealth”⁵¹ because it authorized a general warrant.⁵²

B. Modern Developments

The watershed case for the invocation of state constitutional principles to the law of search and seizure in Massachusetts is *Commonwealth v. Upton*,⁵³ decided in 1985. At issue was the lawfulness of a search of Upton’s mother’s residence and an adjacent motor home pursuant to a search warrant.

1. *Upton I*

In its first pass at the issue in 1983, a majority of the SJC held that “under controlling principles announced by the Supreme Court of the United States, the search was unreasonable in violation of the Fourth Amendment to the Constitution of the United States because there was no demonstrated probable cause to issue the search warrant.”⁵⁴ The “controlling principles” to which the opinion referred was the majority’s view that *Illinois v. Gates*⁵⁵ did not represent a departure from the two pronged *Aguilar-Spinelli*⁵⁶ standard⁵⁷ for determining probable

⁵¹ *Id.* at 22.

⁵² *Id.* at 29. “The measures authorized and directed by this act, are in violation of the principle and spirit of the article respecting general warrants and unreasonable searches.” *Id.* The warrant violated the provisions against general warrants because it was not particular and left to the discretion of the searching officer to decide what was intended for sale and what was not. *Id.* at 30.

⁵³ 476 N.E.2d 548 (1985).

⁵⁴ *Commonwealth v. Upton (Upton I)*, 458 N.E.2d 717, 718 (Mass. 1983), *rev’d*, 466 U.S. 727 (1984). As discussed below, dissenting Justices Lynch and Nolan chided the majority for misreading *Gates* and foreshadowed their resistance to construing either MASS. GEN. LAWS. ch. 276, § 2B (setting forth search warrant requirements) or art. 14 as commanding a different result from the United States Supreme Court’s interpretation. *Id.* at 727-28 (Lynch, J., dissenting).

⁵⁵ 462 U.S. 213 (1983).

⁵⁶ *Aguilar v. Texas*, 378 U.S. 108 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213 (1983); *Spinelli v. United States*, 393 U.S. 410 (1969), *abrogated by Illinois v. Gates*, 462 U.S. 213 (1983).

⁵⁷ The *Aguilar-Spinelli* standard looks to both the basis of knowledge and the veracity of the information on which probable cause is based.

cause.⁵⁸ Dismissing the “totality of the circumstances test” of *Gates* as “standardless,”⁵⁹ the SJC majority declared that “[u]ntil advised to the contrary, we believe the *Gates* opinion should not be read as permitting such a radical result.”⁶⁰

In consequence, the majority concluded, the *Aguilar-Spinelli* standard should continue to control the probable cause determination.⁶¹

Were the SJC majority’s disdain for a “totality of the circumstances” test not sufficiently clear,⁶² it left no room for doubt:

If we have correctly construed the significance of *Illinois v. Gates*, the Fourth Amendment standards for determining probable cause to issue a search warrant have not been made so much less clear and so relaxed as to compel us to try our hand at a definition of standards under art. 14. If we have mis-assessed the consequences of the *Gates* opinion and in fact the *Gates* standard proves to be unacceptably shapeless and permissive, this court may have to define the protections guaranteed to the people against unreasonable searches and seizures by art. 14, and the consequences of the violation of those protections.⁶³

Two dissenting justices disagreed with the majority’s reading of *Gates* and its suggestion that the search warrant statute⁶⁴ or art. 14 might afford greater protections than the Fourth

⁵⁸ “It is not clear that the *Gates* opinion has announced a significant change in the appropriate Fourth Amendment treatment of applications for search warrants.” *Upton I*, 458 N.E.2d at 720.

⁵⁹ See *id.*

⁶⁰ *Id.* at 723.

⁶¹ *Id.* at 717.

⁶² The SJC majority derisively proclaimed that the United States Supreme Court’s description of the *Gates* test as “flexible” and “easily applied” treated the test as if it were “some commercial product.” *Id.* at 720.

⁶³ *Id.* at 724. In a footnote, the majority recognized that a statutory rather than a constitutional basis might also exist for concluding that the search warrant was invalid as a matter of state law. *Id.* at 724 n.10 (“We need not decide here whether the warrant requirements of G. L. c. 276, § 2B, impose a stricter standard for the issuance of a search warrant than the Fourth Amendment or art. 14.”).

⁶⁴ MASS. GEN. LAWS ch. 276, § 2B (2004).

Amendment.⁶⁵ While acknowledging that past decisions had foreshadowed possible differences between art. 14 and the Fourth Amendment, the dissent concluded that “this hypothetical situation has not yet arisen” because where “other provisions of the Massachusetts Constitution have been interpreted to afford greater protection than the United States Constitution . . . , each area has been characterized by a significant divergence between the language and construction of the respective Federal and State provisions.”⁶⁶

2. The Supreme Court’s Response and *Upton II*

The Supreme Court’s rebuke of the SJC followed quickly. In *Massachusetts v. Upton*,⁶⁷ the Supreme Court advised the SJC that the test for measuring probable cause under *Gates* was indeed “totality of the circumstances.”⁶⁸

On remand, the SJC proceeded to consider the defendant’s *state law* challenges: (1) “whether probable cause to issue a search warrant should be determined by a stricter standard in this Commonwealth than under the Fourth Amendment” and (2) “whether evidence seized without probable cause may nevertheless be admitted against a defendant.”⁶⁹ The SJC could well have decided *Upton II* solely on statutory grounds and concluded that the affidavit in support of the search warrant application did not establish probable cause under the search warrant statute without constitutionalizing the meaning of probable cause for purposes of art. 14. Instead, the majority em-

⁶⁵ *Upton I*, 458 N.E.2d at 727 (Lynch, J., dissenting)

The language of the Fourth Amendment to the United States Constitution has been commonly thought of as paralleling that of art. 14, and indeed the structure of the latter has been viewed as occupying an important role in the drafting of the Fourth Amendment. There appears to be no logical basis, and no support in the case law, for interpreting the term “cause” in art. 14 differently from the “probable cause” requirement of the Fourth Amendment.

Id. (citations omitted).

⁶⁶ *Id.* at 728 n.1.

⁶⁷ 466 U.S. 727 (1984).

⁶⁸ *Id.* at 732.

⁶⁹ *Commonwealth v. Upton (Upton II)*, 476 N.E.2d 548, 550 (Mass. 1985).

ployed a constitutional Trojan horse—looking to art. 14 to provide the meaning of “probable cause” for purposes of the search warrant statute while simultaneously declining to impose a constitutional or common law exclusionary rule.⁷⁰

The majority began by considering whether an exclusionary rule applies at all to searches that violate art. 14.⁷¹ However, rather than deciding whether to prohibit the admission of illegally seized evidence as a matter of constitutional or common law, the majority decided that the search warrant statute provides a *statutory prohibition* against the admission of evidence seized pursuant to a search warrant issued without probable cause.⁷² From this predicate determination that the *statute* warranted suppression, the majority then proceeded to consider the standard for determining probable cause under the statute.⁷³

Noting the obvious impossibility that the statute, enacted prior to promulgation of the *Aguilar* and *Spinelli* decisions,⁷⁴ could have intended to incorporate the standards of those decisions, the majority held that the search warrant statute “does not establish any standard for the determination of probable cause, although it does prescribe in general terms the form and content of applications for search warrants.”⁷⁵ Then, rather than interpreting what “probable cause” meant for statutory purposes, the majority turned to “consider what standard art. 14 of the Declaration of Rights of the Constitution of the Commonwealth prescribes for determining the existence of probable cause.”⁷⁶ As justification for diverging from Fourth Amendment interpretation, the majority looked to *history and parentage*,⁷⁷

⁷⁰ *Id.* at 548.

⁷¹ *Id.* at 550.

⁷² *Id.* at 553-54.

⁷³ *Id.*

⁷⁴ See *supra* note 56. The search warrant statute was enacted in 1964. MASS. GEN. LAWS ch. 276, § 2B (2004).

⁷⁵ *Upton II*, 476 N.E.2d at 553.

⁷⁶ *Id.* at 554.

⁷⁷ *Id.* at 555. “The Constitution of the Commonwealth preceded and is independent of the Constitution of the United States. In fact, portions of the Constitution of the United States are based on provisions in the Constitution of the Commonwealth, and this has

precedent,⁷⁸ decisions of sister states, and the commentary of recognized experts⁷⁹ to arrive at the conclusion that art. 14 provides more substantive protection to criminal defendants than the “unacceptably shapeless and permissive” totality of the circumstances test of the Fourth Amendment for determining probable cause.⁸⁰ Thus was born judicial federalism in Massachusetts: art. 14 may afford greater protections against unreasonable searches and seizures than the Fourth Amendment.⁸¹

PART III: *COMMONWEALTH V. GONSALVES* AND
COMMONWEALTH V. RODRIGUEZ: THE DEBATE IN MICROCOSM

Subsequent to *Upton II*, the SJC held that art. 14 afforded greater protections than the Fourth Amendment in a variety of circumstances. *Commonwealth v. Gonsalves*⁸² and *Commonwealth v. Rodriguez*⁸³ exemplify the ongoing debate over whether such invocations of art. 14 are a principled application of the SJC’s independent authority to analyze its own state constitution or a pure policy judgment.

A. *Commonwealth v. Gonsalves*

The majority and dissenting opinions in *Gonsalves* illustrate that whether a state court’s resort to its own constitution

been thought to be particularly true of the relationship between the Fourth Amendment and art. 14.” *Id.*

⁷⁸ *Id.* In examining the occasions where it had reached different results under the state constitution from those dictated by the Federal Constitution, the majority observed that some of the divergences could be explained by differences in language and some by “differences of opinion concerning the application of similar constitutional principles.” *Id.*

⁷⁹ *Id.* at 557. Examining the decisions of sister states and the commentary of recognized experts, the majority noted that sister states that have embraced the *Gates* standard have failed to pay “particular attention to the independent role State courts should play in interpreting State constitutional provisions.” *Id.* at 557 n.10.

⁸⁰ *Id.* at 556. The dissent of Justices Lynch and Nolan offered a succinct critique. “I find nothing in the Massachusetts Declaration of Rights or G. L. c. 276, § 2B, that mandates a stricter standard for determining whether probable cause exists than is found in the United States Constitution.” *Id.* at 560 (Lynch, J., dissenting).

⁸¹ *Id.*

⁸² 711 N.E.2d 108 (Mass. 1999).

⁸³ 722 N.E.2d 429 (Mass. 2000).

is described as judicial federalism or judicial chauvinism depends in large measure on how the question is framed.⁸⁴ The *Gonsalves* majority concluded that art. 14 provides greater protections to drivers and passengers than the Fourth Amendment, and that Massachusetts should depart from the Supreme Court's decisions in *Pennsylvania v. Mimms*⁸⁵ and *Maryland v. Wilson*,⁸⁶ which permit automatic exit orders to drivers and passengers.⁸⁷ Under art. 14 there must be either a particularized reasonable suspicion of a crime or an apprehension of danger to support an exit order to a driver or a passenger.⁸⁸

The majority's rationale for departing from federal principles looked to logic,⁸⁹ the decisions of sister states,⁹⁰ and histo-

⁸⁴ *Gonsalves*, 711 N.E.2d at 108, 116; see *supra* notes 3-4.

⁸⁵ 434 U.S. 106, 111 (1977).

⁸⁶ 519 U.S. 408, 415 (1997).

⁸⁷ *Gonsalves*, 711 N.E.2d at 115.

⁸⁸ *Id.* at 112-13.

⁸⁹ The majority reasoned that because traffic stops and frisks are non-minimal intrusions that invite discriminatory, random, unequal, and arbitrary enforcement, they require justification. *Id.* at 112. Absent justification, there is no basis to extend the intrusion or focus it elsewhere. *Id.* at 113. While recognizing the dangers posed by traffic stops and the need to protect against those dangers, the majority reasoned that such protection could be accommodated by requiring articulation of a reasonable basis for a stop and frisk. *Id.* at 112.

⁹⁰ The majority and dissent parsed the decisions of sister states differently. *Id.* at 114 & nn.7-10.

ry⁹¹ to arrive at a different balancing of interests from that of the United States Supreme Court and the dissent.⁹²

The sharply worded dissent of Justice Charles Fried criticized the majority for engaging in judicial chauvinism and making a pure policy judgment best undertaken by the legislature.⁹³ In Justice Fried's view, the differing policy judgments of the United States Supreme Court and the SJC majority posed a false choice.⁹⁴ By invoking art. 14 as the basis for the rule governing police conduct in traffic stops, the majority prevented the legislature from enacting protections more stringent than those called for by the United States Supreme Court.⁹⁵ The dissent

⁹¹ The majority claimed a primacy in interpretive right deriving from the fact that art. 14 was adopted in 1780, prior to the United States Constitution, in response to the abuses of governmental power and unlawful invasion of privacy inflicted on colonists by British officials:

That the drafters of the Fourth Amendment subsequently chose to replicate the words used in art. 14 cannot support a conclusion that we are compelled to act in lockstep with the United States Supreme Court when it interprets that amendment. Such a conclusion posits a serious misunderstanding of the authority of this court to interpret and enforce the various provisions of the Massachusetts Constitution, particularly those in the area of civil liberties. . . . The nature of federalism requires that State Supreme Courts and State Constitutions be strong and independent repositories of authority in order to protect the rights of their citizens.

Id. at 115.

⁹² *Id.* Justice Ireland's concurrence expresses a somewhat different view of the judicial federalism debate akin to that of Justice Stevens in *Massachusetts v. Upton*, 466 U.S. 727, 735 (1984). *Gonsalves*, 711 N.E.2d at 115-16 (Ireland, J., concurring). The "answer" to the question whether departure from federal precedent is judicial chauvinism or principled application depends on how you formulate the question. *Id.* at 115. "The right question . . . is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand." *Id.* at 115-16 (quoting *Massachusetts v. Upton*, 466 U.S. 727, 738 (1984) (Stevens, J., concurring) (quoting Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984))).

⁹³ *Gonsalves*, 711 N.E.2d at 116-24 (Fried, J., dissenting).

⁹⁴ *Id.* The dissent characterized the United States Supreme Court's bright-line rule for officers in the field as a "second-order balancing [of interests] that weighs the advantages of a myriad of complex individual determinations against the clarity of a readily understood and readily administered bright-line rule." *Id.* at 121. The dissent viewed the SJC's rationale as nothing more than a different balancing of those interests. *Id.*

⁹⁵ *Id.* at 122.

[T]he maxim in dubiis libertas [in uncertain things, freedom] cuts sharply against what the court does today. For the Supreme Court's rule leaves the Legislatures of this nation—which, after all, have the mandate, the experi-

characterized the majority's invocation of history ("John Adams made me do it"⁹⁶) not as constitutional compulsion but as judicial chauvinism motivated by preserving the "warmly contested decisions" of the Warren Court against the Burger and Rehnquist Court retrenchments.⁹⁷

B. *Commonwealth v. Rodriguez*

Following *Gonsalves*, in *Commonwealth v. Rodriguez*, the SJC considered whether a drug interdiction roadblock was an unconstitutional search and seizure.⁹⁸ Relying solely on art. 14, the SJC ruled that a roadblock to search for contraband, such as drugs, was prohibited.⁹⁹ More importantly, the majority announced a methodology of state constitutional primacy derived from text and history in considering challenges to the admissibility of evidence.¹⁰⁰ In the majority's view, resort to art. 14,

ence, and the means to make policy judgments—free to enact more stringent measures if they deem it appropriate. This court's action today removes that option from the Legislature. . . . Quite apart from the greater legitimacy of policy making by the Legislature, the Legislature has the means to gather the facts, to develop structured remedial systems, and the ability to reverse course if it makes a mistake. When we speak in the name of the Constitution, however, we purport to speak for the ages, and, absent a change of heart, only a constitutional amendment can reverse a mistaken course of decision.

Id. at 122-23 (Fried, J., dissenting).

⁹⁶ *Id.* at 123.

⁹⁷ *Id.*

[R]ather than engaging in judicial chauvinism we should ask: Is this decision wise, and—far more to the point—is there something in our Constitution that authorizes us to announce this anomalous rule and, by styling it a constitutional judgment, to put it beyond the reach of the ordinary processes of government?

Id.

⁹⁸ *Commonwealth v. Rodriguez*, 722 N.E.2d 429, 430 (Mass. 2000).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 434-35.

As a general rule in deciding such questions, we look first to any applicable statutes, then to our State Constitution (if argued separately), and only if necessary to the Federal Constitution. We have held that art. 14 may provide greater protection than the Fourth Amendment against searches and seizures. We determine that roadblocks for the purpose of searching for evidence of drug trafficking and other contraband violate art. 14. Therefore, we do not address the defendant's claim under the Federal Constitution.

rather than the Fourth Amendment,¹⁰¹ was warranted because roadblocks to interdict drugs and other contraband essentially give police the same powers over individuals in their automobiles as the writs of assistance granted British officials with respect to individuals in their homes.¹⁰² “Such a search is precisely what James Otis and John Adams sought to prevent by art. 14. ‘Those who do not remember the past are condemned to relive it.’”¹⁰³ The SJC has honored the methodology of state constitutional primacy articulated in *Rodriguez* more in the breach than the observance. Both before and after *Rodriguez*, the SJC has employed all manner of methodologies to decide whether art. 14 provides greater protection than the Fourth Amendment.¹⁰⁴ In *Upton II*, the court declined an available statutory decisional basis and looked to art. 14 to give content to “probable cause” as

Id.

¹⁰¹ Before *Rodriguez*, the United States Supreme Court announced a similar prohibition under the Fourth Amendment. See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). *Contra Illinois v. Lidster*, 540 U.S. 419 (2004) (holding that highway checkpoint to obtain information regarding earlier hit-and-run accident does not violate Fourth Amendment).

¹⁰² See *Rodriguez*, 722 N.E.2d at 435.

Article 14 was drafted in response to the blanket search powers granted to the British by “writs of assistance.” British search policies generally are acknowledged to have spurred on revolutionary sentiment in colonial Massachusetts. Opposition to the search policies centered upon the use by British customs house officers of the writs of assistance, general warrants which allowed officers of the crown to search, at their will, wherever they suspected untaxed goods to be, and granted the officials the right of forcible entry. *Commonwealth v. Cundriff*, 382 Mass. 137, 143 (1980), *cert. denied*, 451 U.S. 973 (1981). See *Boyd v. United States*, 116 U.S. 616, 625 (1886). “The history should not require retelling. But old and established freedoms vanish when history is forgotten.” *Screws v. United States*, 325 U.S. 91, 120 (1945).

Rodriguez, 722 N.E.2d at 435.

¹⁰³ *Rodriguez*, 722 N.E.2d at 435 (quoting 1 GEORGE SANTAYANA, *THE LIFE OF REASON: OF THE PHASES OF HUMAN PROGRESS* 284 (1905)).

¹⁰⁴ See Marangola, *supra* note 7, at 1629-33 (relying most frequently on the primacy model, the SJC also utilizes the dual sovereignty and interstitial models, with individual justices employing lockstep methodology); see also Ireland, *supra* note 19, at 420 (“Although the SJC often interprets the Massachusetts State Constitution consistently with the United States Supreme Court’s interpretation of the Federal Constitution, it does not always do so. In those cases where the SJC does depart, it uses a variety of analytical methods to support its conclusion.”).

set forth in the statute.¹⁰⁵ Similarly, in *Commonwealth v. Macias*,¹⁰⁶ the SJC adopted a common law basis for affording greater protections than required by the Fourth Amendment in establishing the predicate for issuance of a no-knock search warrant (probable cause rather than reasonable belief).¹⁰⁷

PART IV: ARTICLE 14 JURISPRUDENCE AND THE PRIMACY MODEL:
AN INCONSISTENT METHODOLOGY

Even a cursory survey of representative search and seizure decisions illustrates that the SJC is not consistent in looking first to statutory grounds for resolution. Nor does it always look last to the United States Constitution. Indeed, if the case allows, the SJC will sometimes decline to decide whether art. 14 affords greater rights than the Fourth Amendment as, for example, when it concludes that a particular police action would not even satisfy the Fourth Amendment.

¹⁰⁵ *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985).

¹⁰⁶ 711 N.E.2d 130 (Mass. 1999).

¹⁰⁷ *Id.* at 131-34. *Macias* represents yet another analytical model which eschews constitutional application and looks to state common law, supervisory or rule-making powers, and rules of evidence as ways of affording greater rights to state citizens than are afforded by the Federal Constitution. See, e.g., *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 528-35 (Mass. 2004) (holding common law rule entitled defendant to jury instruction regarding absence of electronic recording of custodial confession or statement); *Commonwealth v. Tavares*, 430 N.E.2d 1198, 1204-05 (Mass. 1982) (holding that common law rule of "humane practice" exceeds federal constitutional protections regarding voluntariness of confessions). Such non-constitutionally based approaches can be given prospective application only and are more easily modified than a declaration that the court is changing a constitutional interpretation. See Herbert P. Wilkins, *The State Constitution Matters*, BOSTON BAR JOURNAL, Nov.-Dec. 2000, at 14.

1. Reasonable Expectation of Privacy:

*Commonwealth v. Panetti*¹⁰⁸

Employing the primacy model,¹⁰⁹ a majority¹¹⁰ of the SJC concluded that “[w]hatever the Supreme Court of the United States might decide under the Fourth Amendment to the United States Constitution, we conclude that the search and seizure of the defendant’s conversations violated art. 14 of the Declaration of Rights of the Constitution of the Commonwealth.”¹¹¹

2. Warrantless Electronic Surveillance (One Party Consent):

*Commonwealth v. Blood*¹¹²

Looking to history and the intent of the Framers with respect to the breadth of privacy, and buttressed by decisions in sister states, the majority¹¹³ held that while satisfying the Massachusetts wiretap statute,¹¹⁴ the warrantless electronic interception of conversations held in a private home violated art. 14.¹¹⁵

¹⁰⁸ 547 N.E.2d 46 (Mass. 1989).

¹⁰⁹ See *supra* note 10.

¹¹⁰ The dissent of Justices Nolan and Lynch viewed the majority’s invocation of art. 14 as personal preference. “Equally gratuitous is the court’s conclusion, despite the absence of any authority, that seizure of the defendant’s conversation violated art. 14 of the Declaration of Rights of the Massachusetts Constitution. No authority is cited. No analysis is advanced to support this conclusion. It is simply a naked ipse dixit without logic.” *Panetti*, 547 N.E.2d at 49 (Nolan, J., dissenting).

¹¹¹ *Id.* at 48.

¹¹² 507 N.E.2d 1029 (Mass. 1987).

¹¹³ The dissent opined that the wiretap statute expresses a legislative judgment that “members of organized crime who converse about a designated offense do not have a reasonable expectation of privacy in that conversation. This is a sound judgment.” *Id.* at 1039 (Nolan, J., dissenting). In the view of the dissenting justices, the majority’s conclusion to the contrary was based on its own personal normative content. *Id.* at 1039-40.

¹¹⁴ MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2007).

¹¹⁵ *Blood*, 507 N.E.2d at 1034.

Article 14, like the Fourth Amendment, was intended by its drafters not merely to protect the citizen against “the breaking of his doors, and the rummaging of his drawers,” . . . but also “to protect Americans in their beliefs, their thoughts, their emotions and their sensations” by conferring, “as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”

3. Automatic Standing

Notwithstanding the United States Supreme Court's abandonment of automatic standing in *United States v. Salvucci*,¹¹⁶ a majority of the SJC concluded in *Commonwealth v. Amendola*¹¹⁷ that art. 14 provided more substantive protection than the Fourth Amendment. With little reasoned discussion, the majority stated that "[w]e consider this case an appropriate occasion to announce the adoption of the automatic standing rule under Article 14 of the Massachusetts Declaration of Rights."¹¹⁸

4. Reasonable Suspicion for *Terry* Stop

In *Commonwealth v. Lyons*,¹¹⁹ the SJC declined to apply the Fourth Amendment "totality of the circumstances" test to the

Id. (citations omitted).

The vice of the consent exception is that it institutionalizes the historic danger that art. 14 was adopted to guard against. . . . [T]he consent exception puts the conversational liberty of every person in the hands of any officer lucky enough to find a consenting informant. What was intolerable in 1780 remains so today.

Id. at 1035.

The majority also noted that numerous commentators have criticized the ruling that warrantless surveillance with "one party consent" lies beyond the protections of the Fourth Amendment. *See id.* at 1032. *See also* *United States v. White*, 401 U.S. 745, 751 (1971).

¹¹⁶ 448 U.S. 83 (1980).

¹¹⁷ 550 N.E.2d 121, 125 (Mass. 1990).

¹¹⁸ *Id.* In dissent, Justices Nolan and Lynch criticized the majority's invocation of art. 14 as mere personal predilection:

[T]he language of art. 14 is substantially the same as the language of the Fourth Amendment to the United States Constitution from which the Federal rule of standing is derived. . . . It seems that, whenever we wish to expand the rights of defendants in criminal cases, we simply invoke the Massachusetts Constitution without so much as a plausible argument that the Massachusetts Constitution requires the expansion. The court decides on the result that it wants and simply declares, if the result sought is more favorable to a criminal defendant than Federal law permits, that the Massachusetts Constitution compels such a result without the faintest suggestion of authority either in the language of the Massachusetts Constitution or elsewhere. . . . Perhaps the court has silently adopted the view that, if we say something frequently enough, it must be so. Descartes postulated: *Cogito, ergo sum* [I think, therefore I am]. We dictate: *Dicimus, ergo ita est* [We say, therefore it is so].

Id. at 127 (Nolan, J., dissenting).

¹¹⁹ 564 N.E.2d 390, 392 (Mass. 1990).

determination of reasonable suspicion for a *Terry* stop.¹²⁰ Without specifically invoking art. 14, the *Lyons* majority concluded that the Massachusetts standard for measuring reasonable suspicion was based on “indicia of reliability” as measured by the informant’s basis of knowledge and veracity.¹²¹

5. Random Drug Testing of Police Officers

In *Guiney v. Police Commissioner of Boston*,¹²² a tenuous SJC majority¹²³ concluded that random urinalysis of Boston police officers pursuant to a Boston Police Department rule violated art. 14.¹²⁴

In the majority’s view,

“[T]he important constitutional right of privacy established by art. 14” should not be overruled by “abstract goals of safety and integrity . . . without any factual information in the record to demonstrate frequency of drug use by police officers or to demonstrate any connection between such use and grave harm to the force or public safety.”¹²⁵

¹²⁰ For a discussion of totality of circumstances, see *Alabama v. White*, 496 U.S. 325 (1990) and *Illinois v. Gates*, 462 U.S. 213 (1983).

¹²¹ See *Lyons*, 564 N.E.2d at 391-92. The dissent of Justice Nolan simply observed, “Once again, the court succeeds in imposing its own limitations on the power available to police officers to protect the public.” *Id.* at 394-95 (Nolan, J., dissenting).

¹²² 582 N.E.2d 523 (Mass. 1991).

¹²³ The concurring opinion of Justice Liacos emphasized his disagreement with the view that a “balancing” of public interests versus privacy interests had any place in determining the constitutionality of a search and seizure. *Id.* at 527 (Liacos, J., concurring). “Notwithstanding its allusion to the laws of physics, and their concomitant certainty and precision, a ‘balancing’ test subjects the constitutional right against unreasonable searches and seizures to a standard only slightly more enduring than the latest public opinion poll.” *Id.*

¹²⁴ In *Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir.), *cert. denied*, 493 U.S. 963 (1989), a Fourth Amendment challenge to the Boston Police Department rule was upheld as permissible based on the United States Supreme Court’s opinion in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

¹²⁵ *Guiney*, 582 N.E.2d at 525 (quoting *O’Connor v. Police Comm’r of Boston*, 557 N.E.2d 1146, 1151-52 (Mass. 1990) (Greaney, J., concurring)). The dissent of Justice Nolan argued that the similar language and history of art. 14 and the Fourth Amendment required the SJC to interpret art. 14 in the same manner as the United States Supreme Court interpreted the Fourth Amendment. See *id.* at 527-28.

6. A "Stop" as in the Constitutional Sense

In *Commonwealth v. Stoute*,¹²⁶ a unanimous SJC declined to adopt the Fourth Amendment standard for a "stop" enunciated in *California v. Hodari D*¹²⁷ (stating that a person has been seized for constitutional purposes when there has been an application of physical force or show of authority to which the subject yields). The SJC concluded that "art. 14 provides more substantive protection to a person than does the Fourth Amendment in defining the moment at which a person's personal liberty has been significantly restrained by the police, so that he may be said to have been 'seized' within the meaning of art. 14."¹²⁸ The opinion does not attempt to argue differences in text or history as basis for its conclusion. Rather, the court reasoned that Massachusetts had consistently applied the *Mendenhall*¹²⁹ standard,

Once again a majority of this court has found some hidden meaning within article 14 of the Massachusetts Declaration of Rights to deviate from a decision of the United States Supreme Court in a question concerning the Fourth Amendment to the United States Constitution. . . . What is of paramount concern today is that the majority opinion is totally devoid of any standard used to deviate from the position of the Supreme Court.

Id. at 527 (citations omitted).

Also conspicuous by its absence in the majority opinion is any reference to the history of art. 14. It is well-established that the Fourth Amendment derives from our own art. 14. It is also well-established that Massachusetts adopted art. 14, as a result of the colonists' experiences with British officials, to protect the public from public officials. It is doubly ironic, therefore, that the majority today reaches a conclusion which not only is at odds with the Fourth Amendment but also undermines an effort by the public to protect itself once again from the abuses of public authorities.

Id. at 528 (citations omitted).

The separate dissent of Justice O'Connor has a different basis, criticizing the majority's departure from *stare decisis* as effectively overruling *O'Connor v. Police Commissioner of Boston*, 557 N.E.2d 1146 (Mass. 1990), which upheld random drug testing of police cadets as permissible under art. 14 because of their consent to such a search. See *Guiney*, 528 N.E.2d at 529-32.

¹²⁶ 665 N.E.2d 93, 94-98 (Mass. 1996).

¹²⁷ 499 U.S. 621, 624 (1991).

¹²⁸ *Stoute*, 665 N.E.2d at 95.

¹²⁹ *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 554 (1980). The *Mendenhall* standard provides that a stop occurs for constitutional purposes when, viewing the facts objectively, a reasonable person would not feel free to leave.

and that the *Hodari D.* decision “represents a revision of the United States Supreme Court’s definition of seizure, as well as a departure from that Court’s precedent.”¹³⁰ The SJC noted that, “It is by now firmly established that, in some circumstances, art. 14 affords greater protection against arbitrary government action than do the cognate provisions of the Fourth Amendment.”¹³¹

7. Inadvertence Requirement for Plain View Seizure

In *Commonwealth v. Balicki*,¹³² the SJC declined to eliminate the inadvertence requirement¹³³ from the plain view seizure exception for purposes of art. 14, as the United States Supreme Court had done for Fourth Amendment purposes in *Horton v. California*.¹³⁴ The majority noted that the Supreme Court originally required inadvertent seizure in *Coolidge v. New Hampshire*¹³⁵ before abandoning the requirement in *Horton*,¹³⁶ that Massachusetts courts had adopted an inadvertence requirement after *Coolidge*,¹³⁷ and that such a requirement “[c]ontinues to protect the possessory interests conferred on our citizens by art. 14.”¹³⁸

¹³⁰ *Stoute*, 665 N.E.2d at 96 (citation omitted).

¹³¹ *Id.* at 96 n.10 (quoting *Jenkins v. Chief Justice of the Dist. Court Dep’t.*, 619 N.E.2d 324, 330 n.16 (1993)).

¹³² 762 N.E.2d 290 (Mass. 2002).

¹³³ “Inadvertence” for purposes of the plain view seizure exception “means only that the police lacked probable cause to believe, prior to the search, that specific items would be discovered during the search.” *Id.* at 298. Without an inadvertence limitation, the “particularity requirement” of the Fourth Amendment and art. 14, which serves as a safeguard against general exploratory rummaging by the police, might otherwise be swallowed up by the exception. The particularity requirement “both defines and limits the scope of the search and seizure thereby protecting individuals from general searches, which was the vice of the pre-revolution writs of assistance.” *Id.* at 297 (citations and quotation omitted).

¹³⁴ 496 U.S. 128 (1990).

¹³⁵ 403 U.S. 443 (1971).

¹³⁶ *Balicki*, 762 N.E.2d at 297.

¹³⁷ *Id.* See *Commonwealth v. Santana*, 649 N.E.2d 717, 721 n.6 (Mass. 1995); *Commonwealth v. Sergienko*, 503 N.E.2d 1282, 1284 (Mass. 1987); *Commonwealth v. Cefalo*, 409 N.E.2d 719, 727 (Mass. 1980).

¹³⁸ *Balicki*, 762 N.E.2d at 298.

8. School Searches

Recently, in *Commonwealth v. Considine*,¹³⁹ a unanimous court concluded that the search of a hotel room occupied by three private high school students on a school-sponsored trip by private school officials and those acting with their consent was not state action for purposes of the Fourth Amendment or art. 14.¹⁴⁰ Thus, there need be no basis for the search comparable to that imposed on public school officials.¹⁴¹

Considine followed an interstitial¹⁴² rather than a primary source¹⁴³ methodology, looking first to Fourth Amendment principles, as embodied in *Rendell-Baker v. Kohn*,¹⁴⁴ to conclude that the search did not violate the Fourth Amendment. The art. 14 analysis consisted merely of the statement, "We conclude also that the search in the present case was not unlawful under art. 14 of the Declaration of Rights."¹⁴⁵

PART V: CONCLUSION

In the years since *Upton II*, the SJC has often recognized its authority and duty to interpret and enforce cognate provisions of the Massachusetts Constitution that afford greater protections than its federal counterpart.¹⁴⁶ Whether such forays in state constitutional interpretation represent judicial federalism or judicial chauvinism is not easily ascertainable. While a court must not announce constitutional principles lightly, neither should it shrink from doing so when required. "If we place too much reliance on Federal precedent we will render the State

¹³⁹ 860 N.E.2d 673 (Mass. 2007).

¹⁴⁰ *Id.* at 677-78.

¹⁴¹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (holding that public school officials searching students' persons and effects were acting as agents of the state and thus subject to the Fourth Amendment's exclusionary rule).

¹⁴² See *supra* note 8.

¹⁴³ See Marangola, *supra* note 7.

¹⁴⁴ 457 U.S. 830, 837-843 (1982).

¹⁴⁵ *Considine*, 860 N.E.2d at 677.

¹⁴⁶ See Herbert P. Wilkins, *Remarks of Chief Justice Herbert P. Wilkins to Students at New England School of Law on March 27, 1997*, 31 NEW ENG. L. REV. 1205, 1213 (1997).

rules a mere row of shadows; if we place too little, we will render State practice incoherent.”¹⁴⁷ Both judicial activism and judicial abdication pose real dangers: one seriously erodes the court’s institutional legitimacy and the other ignores the vital role that the judicial branch plays in protecting citizens from the tyranny of the majority and what “the home crowd wants.”

If a state court does decide to constitutionalize a principle or to depart from the United States Supreme Court’s articulation of a constitutional principle, on what basis should it make that decision? Is the decision required by the state constitution? How does the court divine such a requirement? While methodology supports intellectual discipline, consistency, and objectivity in analysis, the use of formulae obscures the constitutional principles and how those principles are developed.¹⁴⁸

Arriving at a coherent and principled state constitutional doctrine requires less focus on the methodology for departure and more on the manner in which judges should decide cases and make law. The legitimacy of each judicial decision, indeed a court’s institutional legitimacy, rests on the bedrock premise that a court is different from the legislature.¹⁴⁹ Courts are counter-majoritarian. By invoking the constitution, a court is able to thwart the will of the majority and insulate its decision from the reach of the legislature, and even from the people, absent a constitutional amendment.¹⁵⁰ The absence of reasoned explanation for invocation of the state constitution fuels the criticism that the state court’s departure is attributable more to a “visceral reaction to ideological trends in the United States Supreme Court”¹⁵¹ than to the unique language or historical origins of the state constitution; that departure from federal precedent is due

¹⁴⁷ *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring).

¹⁴⁸ See HENNESSEY, *supra* note 5, at 53.

¹⁴⁹ Indeed, in Massachusetts as in few other states, judges are not elected but appointed with life tenure.

¹⁵⁰ As Justice Fried observed, “When we speak in the name of the Constitution . . . we purport to speak for the ages and, absent a change of heart, only a constitutional amendment can reverse a mistaken course of decision.” *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 122 (Mass. 1999) (Fried, J., dissenting).

¹⁵¹ See Abrahamson, *supra* note 12, at 1177 (quoting *State v. Davis*, 686 P.2d 1143, 1147 (Wash. 1984) (Durham, C.J., dissenting)).

to "ideology, not sound constitutional doctrine";¹⁵² and that "the decision to rely or not to rely on a state constitution is an unprincipled, result-oriented decision."¹⁵³ Moreover, when a court moves too far ahead or falls too far behind in recognizing and giving expression to the shared democratic values embodied in general constitutional principles, it undermines the legitimacy that permits the lawmaking power of the nonmajoritarian branch to be accommodated in a democracy.¹⁵⁴

The choice need not be between the Scylla of judicial abdication or the Charybdis of judicial activism. "With some informed attention to constitutional texts, history, and the lessons of federalism—aided by the insights of practicing and academic lawyers—state courts can and should have coherent, independent doctrines surrounding their state constitutional provisions."¹⁵⁵ When deciding even an ordinary case, a court must articulate its rationale clearly. When it constitutionalizes a principle, a court's obligation is even greater because it "speak[s] for the ages" and prevents the popularly elected legislature from acting.¹⁵⁶ What is there—in precedent, reason, logic, experience, and decisions from our sister states or evolving standards¹⁵⁷ that are commonly recognized and accepted as part of our shared democratic values—that requires imposing a constitutional mandate? What is there in the state's constitution that dictates departure from that mandate as articulated by the United States Supreme Court?

¹⁵² Abrahamson, *supra* note 12, at 1178.

¹⁵³ Abrahamson, *supra* note 12, at 1179 n.153.

¹⁵⁴ Acceptance of the decision by the community "in the end is how and why judicial review is consistent with the theory and practice of political democracy." ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 258 (1962).

¹⁵⁵ Williams, *supra* note 2, at 1064 (footnote omitted).

¹⁵⁶ *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 122 (Mass. 1999) (Fried, J., dissenting).

¹⁵⁷ It is in these forays that the court runs the greatest risk of being viewed as a "super-legislature." See Ireland, *supra* note 19, at 418. "Yet the court cannot necessarily refuse such explorations; the constitution requires the court to ensure that each individual's sovereign constitutional rights are protected, even if a decision will go against the weight of public opinion or will strike down an act of the legislature." *Id.*

Even beyond restrained exercise, the awesome power of constitutional interpretation warrants convincing explanation. "For principled and persuasive decision-making it is important that the state court explain why the reasoning of the United States Supreme Court is or is not persuasive."¹⁵⁸ Principled and persuasive decision-making requires articulation of what Professor Cass Sunstein has described as a "completely theorized justification" of the basis for the judicial exercise of interpretive judgment.¹⁵⁹ Such articulation not only makes manifest what led the court to conclude that a constitutional command has a particular meaning, it also encompasses "the rationale underlying a court's explication of the doctrinal standards and rules with which a constitutional command will be applied in discrete cases."¹⁶⁰ "To the extent a state court commits to articulating the rationale that supports its substantive disagreement with the result in a federal constitutional case concerning a parallel individual rights protection, the state decision will yield insights into how best to interpret and apply the constitutional provision in question—how best, that is, to reconcile an individual right with contrary majoritarian desires."¹⁶¹ The decision must not merely invoke history and assert that "John Adams made me do it." Rather, the decision must persuade that it springs from the basic constitutional principles on which reasonable people agree, not personal predilection.

¹⁵⁸ Abrahamson, *supra* note 12, at 1176.

¹⁵⁹ See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 7-9 (1999).

¹⁶⁰ Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 267 (2007).

¹⁶¹ *Id.* at 298.

THE TEXAS EXPERIENCE: A CASE FOR THE LOCKSTEP APPROACH

*Michael E. Keasler**

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I. INTRODUCTION¹

The general debate among judges, legal scholars, and lawmakers about the benefits and drawbacks of the doctrine of independent state constitutional grounds is well-documented.² But this article focuses on the use of the doctrine in search and seizure law and, specifically, the interplay between the Fourth Amendment to the United States Constitution and Texas's corollary provision—Article I, Section 9 of the Texas Constitution—in the context of the exclusionary rule.

Although providing greater protection under state constitutions than that which is required under the Fourth Amendment has gained popularity in some state courts in recent years, I believe that the interpretations of the Fourth Amendment protections by the Supreme Court of the United States adequately balance the right to be free from unreasonable searches and seizures and the need to protect society from criminal behavior.

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¹ I would like to express my deep appreciation to April Strahan, my former law clerk, for her invaluable assistance in preparing this article.

² See generally Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41 (2006) (describing arguments in favor of state constitutionalism); Catherine Greene Burnett & Neil Colman McCabe, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges*, 25 TEX. TECH L. REV. 75 (1993) (describing the debate over state constitutional law challenges).

II. A BRIEF HISTORY OF THE EXCLUSIONARY RULE

The common-law rule was that, if the tendered evidence is important, the method of obtaining it is unimportant. And until the late 1880s, both American state and federal courts adhered to it. But the Fourth Amendment's prohibition against unreasonable searches and seizures led to the creation of the exclusionary rule, which "prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search"³

In 1886 in *Boyd v. United States*, the Supreme Court of the United States first applied the exclusionary rule to unlawful searches and seizures in civil cases.⁴ And twenty-eight years later, in *Weeks v. United States*, the Court extended the rule to federal criminal cases.⁵ "The striking outcome of the *Weeks* [c]ase and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction, if obtained by government officers through a violation of the amendment."⁶ The Court has explained: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."⁷ "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."⁸

In 1949 in *Wolf v. Colorado*, the Supreme Court had determined that the Fourth Amendment exclusionary rule did not apply to a prosecution in a state court for a state crime.⁹ But in 1961, in the seminal case of *Mapp v. Ohio*, the Supreme Court

³ *Murray v. United States*, 487 U.S. 533, 536 (1988) (citing *Weeks v. United States*, 232 U.S. 383 (1914) (citations omitted)).

⁴ 116 U.S. 616, 638 (1886).

⁵ 232 U.S. 383, 398 (1914).

⁶ *Olmstead v. United States*, 277 U.S. 438, 462 (1928).

⁷ *Elkins v. United States*, 364 U.S. 206, 217 (1960).

⁸ *United States v. Calandra*, 414 U.S. 338, 348 (1974).

⁹ 338 U.S. 25, 33 (1949).

extended the Fourth Amendment and the exclusionary rule to the states by way of the Fourteenth Amendment.¹⁰ In *Mapp*, three Cleveland police officers arrived at the home of Dollree Mapp.¹¹ The police had information that “a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing[.]”¹² The police also had information that a large amount of gambling paraphernalia was being hidden in the house.¹³ The police officers knocked and demanded entrance, but Mapp refused to allow them inside without a search warrant.¹⁴ The police advised headquarters of the situation and then began conducting surveillance of Mapp’s home.¹⁵

Three hours later, four additional police officers arrived, and they again demanded entrance.¹⁶ When Mapp did not answer the door immediately, the police officers forcibly entered her home.¹⁷ Mapp’s attorney arrived shortly after the police gained entry, but the police refused to allow her attorney to enter the home or speak with Mapp.¹⁸ When Mapp demanded to see the search warrant, an officer held up a piece of paper that he claimed was a warrant.¹⁹ Mapp took the paper and “placed it in her bosom.”²⁰ The officers struggled with Mapp, recovered the piece of paper, and handcuffed Mapp for being “belligerent.”²¹ The officers then took Mapp upstairs to her bedroom and searched a dresser, chest of drawers, closet, and some suitcases.²² The search ultimately encompassed almost the entire house, during which the officers discovered obscene materials.²³

¹⁰ 367 U.S. 643, 655 (1961).

¹¹ *Id.* at 644.

¹² *Id.* (alteration in original).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 644-45.

²² *Id.* at 645.

²³ *Id.*

At *Mapp*'s trial, the State never offered the search warrant or an explanation for its failure to produce one.²⁴ But the State argued that:

[E]ven if the search were made without authority, or otherwise unreasonably, [the State] is not prevented from using the unconstitutionally seized evidence at trial, in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."²⁵

In *Mapp*, the Supreme Court acknowledged *Wolf* but nevertheless held that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."²⁶ The Court reasoned that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."²⁷

Although the language in *Mapp* was expansive and encouraged broad application of the exclusionary rule,²⁸ in the years following *Mapp* the Supreme Court has resisted such an expansive application. In *United States v. Leon*, the Court recognized the rule's drawbacks and admitted that its application can generate substantial social costs, such as setting guilty and dangerous people free.²⁹ In *Sanchez-Llamas v. Oregon*, the Court noted that "[t]he exclusionary rule as we know it is an entirely American legal creation. . . . [t]he automatic exclusionary rule applied in our courts is still 'universally rejected' by other countries."³⁰

And in *Hudson v. Michigan*, the Court refused to apply the rule to suppress evidence seized where police officers had violated

²⁴ *Id.*

²⁵ *Id.* at 645-46 (citation omitted) (quoting *Wolf v. Colorado*, 338 U.S. 25, 33 (1949)).

²⁶ *Id.* at 655.

²⁷ *Id.*

²⁸ See *Hudson v. Michigan*, 126 S. Ct. 2159, 2163-64 (2006).

²⁹ 468 U.S. 897, 907-08 (1984).

³⁰ 126 S. Ct. 2669, 2678 (2006) (quoting Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399 (2001)).

the “knock and announce” rule,³¹ which is an “ancient” common-law principle that requires officers to “announce their presence and provide residents an opportunity to open the door”³² “Suppression of evidence . . . has always been our last resort, not our first impulse.”³³ The Court held that the evidence did not require exclusion because, among other reasons, “exclusion may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence;”³⁴ “the knock and announce rule has never protected . . . one’s interest in preventing the government from seeing or taking evidence described in a warrant;”³⁵ and the social costs of applying the exclusionary rule to knock-and-announce violations were significant.³⁶ And after considering the intent of the rule, the Court recalled the remedies that were available at the time it decided *Mapp v. Ohio* and noted:

Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities. Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court’s decision in *Bivens v. Six Unknown Fed. Narcotics Agents* ³⁷

More than fifty years earlier, in *Irvine v. California*, Justice Robert Jackson, writing for the majority, had highlighted the problems with the remedies then available for “official lawlessness,” which he asserted were “too often . . . of no practical avail.”³⁸ But though the exclusionary rule may potentially act as a shield for those who have committed crimes, as Justice Jackson explained, the alternative is even more undesirable:

³¹ *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring).

³² *Id.* at 2162.

³³ *Id.* at 2163.

³⁴ *Id.* at 2164.

³⁵ *Id.* at 2165.

³⁶ *Id.* at 2165-68.

³⁷ *Id.* at 2167 (citing *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978)).

³⁸ 347 U.S. 128, 137 (1954).

Of course, [the Fourth Amendment], like each of our constitutional guaranties, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self respect. They may have overvalued privacy, but I am not disposed to set their command at naught.³⁹

Justice John Paul Stevens, however, opined that the exclusionary rule as a remedy is not limited to deterrence of police misconduct:

Both the constitutional text and the history of [the Fourth Amendment and the exclusionary rule's] adoption and interpretation identify a more majestic conception. The Amendment protects the fundamental "right of the people to be secure in their persons, houses, papers, and effects," against *all* official searches and seizures that are unreasonable. The Amendment is a constraint on the power of the sovereign, not merely on some of its agents. The remedy for its violation imposes costs on that sovereign, motivating it to train all of its personnel to avoid future violations.⁴⁰

We must remember the rationale behind the exclusionary rule. Much like a teacher who punishes an entire class for the bad behavior of one student, application of the exclusionary rule could result in the "punishment" of an entire community if an offender is released because the rule required suppression of evidence that positively established the offender's guilt, but was illegally obtained.

III. NEW FEDERALISM

The Fourth Amendment is not the only source of authority used to justify the exclusionary rule. States have their own constitutions and statutes addressing search and seizure. But it is the relationship between federal and state law that proves interesting. And this is where the doctrine of "new federalism" comes into play.

³⁹ *Harris v. United States*, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting).

⁴⁰ *Arizona v. Evans*, 514 U.S. 1, 18-19 (1995) (Stevens, J., dissenting) (citation omitted).

"The traditional role of 'federalism' refers to the coordinate relationship and distribution of power between the individual states and our national government."⁴¹ But "new federalism"—also called "dual constitutionalism" and "independent state constitutionalism"—refers to a doctrine that "urge[s] state courts to declare their independence from the United States Supreme Court" by "interpret[ing] state constitutions as more protective of individual rights than the Supreme Court had interpreted the Bill of Rights to the United States Constitution."⁴²

Justice William Brennan, who would later become one of the most well-recognized advocates of state constitutional rights,⁴³ stated in an address delivered to the Conference of Chief Justices three years after *Mapp v. Ohio* that

The Supreme Court of the United States cannot escape its responsibility for the ultimate definition and application of [the equal protection] guarantee. In the same area of responsibility falls, I think, the series of decisions extending some of the guarantees of the first eight amendments to the States. The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty.⁴⁴

Note that Justice Brennan did not mention anything in his address about the states being laboratories or their "manifest purpose . . . to expand constitutional protections," as he would later discuss in his 1977 law review article.⁴⁵ But he did, after discussing the interplay between federal and state judicial decision-making, comment:

⁴¹ *Autran v. State*, 887 S.W.2d 31, 36 (Tex. Crim. App. 1994) (en banc) (citing THE FEDERALIST NO. 51, at 523 (J. Madison) (Clinton Rossiter ed. 1961)).

⁴² Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 6 (1996).

⁴³ Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 792 (1998) (chronicling Justice Brennan's advocacy of state constitutional rights and referring to him as "a hero of the constitutions of the United States").

⁴⁴ William J. Brennan, Jr., *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 955 (1964).

⁴⁵ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

It is therefore fair to say, I think, that constitutional adjudication now leaves the States the widest latitude to deal with the dynamics of social and economic change in seeking to satisfy their needs and further their progress. Moreover, in all the areas of strictly local concern, the federal courts are required these days to defer to holdings of the state courts to a degree quite unknown before *Erie v. Tompkins*,⁴⁶ and even in the area of choice-of-law rules, where competing state interests in a conflicts-of-law case present aspects of the national interest in interstate harmony, our Court no longer suggests that the Constitution dictates the solution. State courts have considerable latitude to experiment with the development of viable rules.⁴⁷

Although there was evidence of the new federalism doctrine in earlier judicial opinions and law review articles,⁴⁸ Justice Brennan has been credited with popularizing the doctrine.⁴⁹ He led the way in advocating states using their constitutions to protect individual rights, and he appealed to the states to do so in his dissent in *Michigan v. Mosley*⁵⁰ and in his 1977 *Harvard Law Review* article.⁵¹ As one scholar put it, Justice Brennan began a "campaign to invite state courts to go further in protecting individual liberties than he finds his brethren willing to go,"⁵² and in subsequent opinions, "renewed his plea to the state courts to make creative use of their state constitutions."⁵³

Justice Brennan's first clear move toward new federalism came in *Michigan v. Mosley* in his dissent to the majority's holding that "the admissibility of statements obtained after the per-

⁴⁶ 304 U.S. 64 (1938).

⁴⁷ Brennan, *supra* note 44, at 954.

⁴⁸ See Randall T. Shepard, *The New Judicial Federalism: A New Generation: The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421-29 (1996) (detailing some of the "impressive attempts at independent state constitutional interpretation before Justice Brennan's 1975 dissent [in *Michigan v. Mosley*] and his 1977 article"); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

⁴⁹ Pitler, *supra* note 42, at 6.

⁵⁰ 423 U.S. 96, 120 (1975) (Brennan, Marshall, JJ., dissenting).

⁵¹ See generally Brennan, *supra* note 45.

⁵² A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 874 (1976).

⁵³ *Id.* at 875.

son in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'"⁵⁴ Justice Brennan characterized the holding as "yet another step in the erosion" of *Miranda*⁵⁵ and advised state courts:

In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.⁵⁶

Two years after his dissent in *Mosley*, Justice Brennan's article—*State Constitutions and the Protection of Individual Rights*—appeared in the *Harvard Law Review*.⁵⁷ In his article, he advocated:

[T]he point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.⁵⁸

Justice Brennan further asserted that the Supreme Court's decisions did not "properly understand the nature of our federalism".⁵⁹

Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that

⁵⁴ *Mosley*, 423 U.S. at 104.

⁵⁵ *Id.* at 112 (Brennan, J., dissenting).

⁵⁶ *Id.* at 120.

⁵⁷ See Brennan, *supra* note 45.

⁵⁸ *Id.* at 491.

⁵⁹ *Id.* at 502.

it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.⁶⁰

One scholar challenged Justice Brennan's position, claiming "that his purported concern for state autonomy is inconsistent with the structure of his remaining jurisprudence;" that "his analysis is unsound and perhaps even disingenuous;" and that he defines healthy federalism as a system that enforces the values that he agrees with.⁶¹ These arguments have merit.

Many courts have acknowledged the principle that "the United States Constitution provides the floor for our Constitutional rights while the various State constitutions provide the ceiling."⁶² On the other hand, of course, a state may interpret its constitution as providing less protection than the Federal Constitution, but the state must then give force to the broader Federal Constitution.⁶³

⁶⁰ *Id.* at 502-03 (citations omitted).

⁶¹ Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988).

⁶² See, e.g., *Autran v. State*, 887 S.W.2d 31, 34 (Tex. Crim. App. 1994) (citing *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991)); see also Stewart G. Pollock, *The Emergence of State Constitutional Law: Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 980 (1985); cf. Garrett T. Reece, Comment, *Securing One's Fourth Amendment Rights Through Issue Preclusion: Assessing Texas's Application of Collateral Estoppel to Multiple Suppression Motions Filed in Separate Courts*, 37 ST. MARY'S L.J. 241 (2005) (describing alternate approaches to protecting an individual's constitutional rights where both the federal and Texas constitutions fall short).

⁶³ *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998); see also Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 86 (1996).

Scholars have recognized that states typically use one of three approaches when deciding a case based on a state constitutional law claim. Some states use the “dual reliance” method in which the “court analyzes the case in terms of both federal and state constitutional claims.”⁶⁴ Under the second approach—the “supplemental” or “interstitial” approach—a court looks first to federal constitutional law and considers state constitutional law only if federal law fails to provide sufficient protection for the right at issue.⁶⁵ Under the final approach—the “primacy” approach—the court looks at its own constitutional law first.⁶⁶ And Texas, the focus of this article, has inconsistently used all three approaches throughout the history of its search and seizure jurisprudence.

IV. THE TEXAS EXPERIENCE

Before the Supreme Court extended the exclusionary rule to the states in *Mapp v. Ohio*, Texas had enacted a statutory exclusionary rule in Article 38.23 of the Texas Code of Criminal Procedure.⁶⁷ The language of Article 38.23 has remained largely the same since its adoption⁶⁸ and currently provides:

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the

⁶⁴ Patricia Fahlbusch & Daniel Gonzalez, Case Comment, *Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAMI L. REV. 159, 188 (1987).

⁶⁵ *Id.* at 188-89.

⁶⁶ *Id.* at 189.

⁶⁷ *Heitman v. State*, 815 S.W.2d 681, 684 n.3 (Tex. Crim. App. 1991) (en banc).

⁶⁸ See Nathan L. Mechler, Comment, *Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of "Other Person(s)" Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure*, 36 ST. MARY'S L.J. 195, 199 & n.15 (2004).

provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

(b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.⁶⁹

As one scholar explained, the Fourth Amendment and the Texas Constitution “together only supply the framework for the Texas exclusionary rule. Article 38.23 is the addition upon this framework that affords greater protections against unreasonable searches and seizures than what federal law requires.”⁷⁰

Before 1991, the Texas Court of Criminal Appeals had repeatedly asserted that Article I, Section 9 of the Texas Constitution and the Fourth Amendment are the same in all material respects.⁷¹ For example, in *Texas v. Brown*, a plurality of the Supreme Court of the United States determined that the Texas Court of Criminal Appeals had incorrectly held that the search at issue was invalid and remanded the case for further proceedings.⁷² On remand, the court of criminal appeals considered the appellant’s two issues: (1) whether the court had relied on the Fourth Amendment or the Texas Constitution in its original decision; and (2) whether the Texas Constitution provides “an independent basis” that would support the court’s original holding that the search at issue was illegal.⁷³

The court asserted that its original decision “rested squarely on the interpretation of the Fourth Amendment”⁷⁴ And the court “decline[d] [the appellant’s] invitation to attach to Article I, Section 9 of our Texas Constitution a more restrictive standard of protection than that provided by the Fourth Amendment.”⁷⁵ “[T]his Court has opted to interpret [the Texas] Constitution in harmony with the Supreme Court’s opinions interpreting the

⁶⁹ TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 2005).

⁷⁰ Mechler, *supra* note 68, at 198.

⁷¹ Crowell v. State, 180 S.W.2d 343, 346 (Tex. Crim. App. 1944).

⁷² Texas v. Brown, 460 U.S. 730, 744 (1983).

⁷³ Brown v. State, 657 S.W.2d 797, 798 (Tex. Crim. App. 1983) (en banc), *overruled* by Heitman v. State, 815 S.W. 2d 681 (Tex. Crim. App. 1991).

⁷⁴ *Id.*

⁷⁵ *Id.*

Fourth Amendment. [The court of criminal appeals] shall continue on this path until such time as we are statutorily or constitutionally mandated to do otherwise.”⁷⁶

Three judges, however, concurred only in the result and called the court’s second holding—that it would construe the Texas Constitution “in harmony with the Supreme Court’s opinions”—a “dangerous abdication of judicial duties and responsibilities as Judges of this Court.”⁷⁷ Judge Clinton, writing for the concurring judges, warned that

merely to parrot opinions of the Supreme Court of the United States interpreting the Fourth Amendment is to denigrate the special importance our Texan forbearers attached to their rights to privacy and other guarantees vouchsafed by the Bill of Rights they first declared and then insisted on retaining in every successive Constitution.⁷⁸

Eight years later, in *Heitman v. State*, the court of criminal appeals considered a case in which the appellant, Heitman, appealed the trial judge’s ruling on his motion to suppress evidence seized during an inventory search of his vehicle.⁷⁹ Heitman argued that the search violated his rights under the Fourth Amendment and Article I, Section 9 of the Texas Constitution.⁸⁰ The Second Court of Appeals construed Heitman’s Article I, Section 9 claim “in harmony with the Fourth Amendment.”⁸¹ Citing the court of criminal appeals’s opinion in *Brown v. State*,⁸² the court reasoned that because “we find in this case that the Fourth Amendment to the United States Constitution was not violated, following *Brown* we determine that article I, section 9 of the Texas Constitution was not violated.”⁸³

The Texas Court of Criminal Appeals granted review to determine if Heitman’s claim was meritorious under either the fed-

⁷⁶ *Id.* at 799.

⁷⁷ *Id.* at 800 (Clinton, J., concurring).

⁷⁸ *Id.* at 807.

⁷⁹ 815 S.W.2d at 682.

⁸⁰ *Id.*

⁸¹ *Id.*; *Heitman v. State*, 776 S.W.2d 324, 325 (Tex. App.-Fort Worth 1989), *rev’d en banc*, 815 S.W.2d 681 (Tex. Crim. App. 1991).

⁸² 657 S.W.2d 797 (Tex. Crim. App. 1983) (*en banc*).

⁸³ *Heitman*, 776 S.W.2d at 326.

eral or the state provision.⁸⁴ Noting the intermediate appellate court's "cursory treatment" of Heitman's Article I, Section 9 claim, the court stated that it would "reserve for ourselves the power to interpret our own constitution."⁸⁵ The court then "confront[ed] the question of whether this Court will automatically adopt and apply to Art. I, § 9, of the Texas Constitution the Supreme Court's interpretations of the Fourth Amendment."⁸⁶ The court recognized that the Texas Constitution and the Fourth Amendment were "the same in all material aspects," but explained that principles of federalism allow states to "reject federal holdings as long as state action does not fall below the minimum standards provided by federal constitutional protections."⁸⁷ Although the court admitted that it "has not chosen to interpret Art. I, § 9 in a manner that accords the citizens of this State greater protections than those accorded by the Fourth Amendment[.]"⁸⁸ after a review of its prior cases, the court determined that "there are several reasons and situations other than similarity of wording or absence of statutory or constitutional mandates which justify, if not compel, a state court to independently judicially interpret its own state constitutional provisions."⁸⁹

Defending its holding, the court adopted Justice Brennan's argument, noting that "[s]tate courts have . . . been considered 'laboratories' of constitutional law. State courts have the opportunity to experiment with constitutional rights and lay potential guidelines for future constitutional decisions of not only state courts but the Supreme Court as well."⁹⁰ The court "expressly conclude[d] that [the] Court, when analyzing and interpreting Art. I, § 9, Tex. Const., will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue."⁹¹ The court then remanded the case to the court of appeals for consideration of Heitman's state constitutional claim.⁹²

⁸⁴ *Heitman*, 815 S.W.2d at 682.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 683.

⁸⁹ *Id.* at 685.

⁹⁰ *Id.* at 686.

⁹¹ *Id.* at 690.

⁹² *Id.*

Three years later, in *Autran v. State*, a three-judge plurality answered the question left open in *Heitman* by holding that the Texas Constitution provides greater protection than the Fourth Amendment for searching containers in automobiles.⁹³ The court explained that “to determine whether the Texas Constitution provides greater protection than the United States Constitution in the context of inventories, we must first determine what protection is provided by the Fourth Amendment.”⁹⁴ Turning to the Supreme Court’s Fourth Amendment jurisprudence, the Texas Court of Criminal Appeals noted that “an inventory has long been recognized as a valid exception to the warrant requirement of the Fourth Amendment.”⁹⁵ “The Fourth Amendment requires only that an inventory not be a ‘ruse for a general rummaging in order to discover incriminating evidence.’”⁹⁶ So, as the court noted, “inventories conducted pursuant to an established departmental policy have generally been constitutional.”⁹⁷ Defining the Supreme Court’s position on inventory searches, the court stated, “[T]he Fourth Amendment permits the inventory of a closed container so long as the officer follows departmental policy or, in the officer’s opinion, the search furthers the purposes of an inventory search.”⁹⁸

Because the inventory search conducted in *Autran* was done pursuant to an established departmental policy, because the officer could not determine the contents of the containers by examining their exteriors, and because there was no evidence that the inventory was a ruse, the court held that the search did not violate the Fourth Amendment.⁹⁹

So the court turned to the issue left open in *Heitman*—whether the Texas Constitution provides more protection than the Fourth Amendment in the context of inventory searches. To answer that question, the court considered five factors: “(A) a textual examination of the constitutional provision; (B) the Framer’s

⁹³ 887 S.W.2d 31, 41-42 (Tex. Crim. App. 1994) (en banc) (plurality opinion).

⁹⁴ *Id.* at 34.

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

⁹⁷ *Id.* (citing *South Dakota v. Opperman*, 428 U.S. 364 (1976)).

⁹⁸ *Id.* at 35-36.

⁹⁹ *Id.* at 36.

intent; (C) history and application of the constitutional provision; (D) comparable jurisprudence from other states; and (E) the practical policy considerations behind the constitutional provision.”¹⁰⁰

As to the first factor, the court explained that the textual similarity between the Fourth Amendment and Article I, Section 9 “appears to be merely a coincidence of historical fact.”¹⁰¹ The court reasoned that the similarities in the text were due to a common origin, not due to their intended meanings.¹⁰² The court could not find evidence of the second factor—the Framers’ intent in enacting Article I, Section 9—as to whether the Framers intended to give broader protection than that given by the Fourth Amendment.¹⁰³

The court then turned to the third factor and considered the history and application of Article I, Section 9. The court noted that it was “unclear whether the Framers looked to the Fourth Amendment for guidance in drafting art. I, §9, [but] it is clear that the Fourth Amendment was derived from the Massachusetts State Constitution.”¹⁰⁴ And the court recognized that the Massachusetts Supreme Court had held that its constitution provided greater protection than the Fourth Amendment.¹⁰⁵ “Consideration of the history of the Fourth Amendment, art. XIV of the Massachusetts Constitution, and the similarities between art. I, § 9 and the Massachusetts Constitution, provides evidence that art. I, § 9 was intended to provide broader protection as well.”¹⁰⁶

As to the fourth factor—comparable jurisprudence—the court explained that “a growing number of state courts have opted for judicial independence.”¹⁰⁷ Although the “common denominator” among the states that followed the Supreme Court’s interpretation of the Fourth Amendment was “a desire to maintain uniformity among those decisions from the United States

¹⁰⁰ *Id.* at 37.

¹⁰¹ *Id.* at 38. (citing *Eisenhauser v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988)).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 39 (citing *Harris v. United States*, 331 U.S. 145 (1947)).

¹⁰⁵ *Id.* (citing *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1367 (Mass. 1992); *Commonwealth v. Upton*, 476 N.E.2d 548, 556 (Mass. 1985)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 39-40.

Supreme Court and those from the states' highest courts[.]”¹⁰⁸ the court commented that “such reasoning conflicts with ‘[a state’s highest court’s] sworn duty to preserve, protect and defend the constitution and laws of [that state].’”¹⁰⁹ After reviewing several cases from other states, the court observed that several of the states that had found greater protection under their constitutions than that provided by the Fourth Amendment “specifically considered the protection to be provided” in the context of inventory searches.¹¹⁰

Turning to the final factor—the practical policy considerations behind the constitutional provision—the court explained that there are three rationales behind an inventory search:

First, an accurate inventory provides protection to the owner whose property is in police custody. Second, the preparation of an accurate inventory protects the officers and their agency from claims of, or disputes concerning, property being lost or stolen. Finally, allowing the officers to impound and inventory property protects the officers and others from potential danger.¹¹¹

Taking all five factors into account, the court held “that art. I, § 9 provides a privacy interest in closed containers which is not overcome by the general policy considerations underlying an inventory.”¹¹² Offering a way to preserve that protection, the court stated: “The officer’s interest in the protection of [Autran’s] property, as well as . . . the protection of the agency from claims of theft, can be satisfied by recording the existence of and describing and/or photographing the closed or locked container.”¹¹³ But the court cautioned:

This is not to say that officers may never search a closed or locked container, only that the officers may not rely upon the inventory exception to conduct such a warrantless search. We

¹⁰⁸ *Id.* at 40.

¹⁰⁹ *Id.* (quoting *Eisenhauer v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988) (Clinton, J., dissenting)).

¹¹⁰ *Id.*

¹¹¹ *Id.* (citations omitted).

¹¹² *Id.* at 41-42.

¹¹³ *Id.* at 42.

refuse to presume the search of a closed container reasonable under art. I, § 9 simply because an officer followed established departmental policy.¹¹⁴

Presiding Judge McCormick, joined by Judge White, vehemently dissented to the majority's holding:

Today, the plurality attempts to lead this Court down the slippery slope of judicial activism by legislating in this particular case a constitutional rule of unprincipled, result-oriented decision-making as a means for judges to impose their views on others. It should not be this Court's role to correct the perceived injustice here by judicially legislating what it considers to be a socially or politically desirable result. . . . [T]he plurality attempts to make this Court's voice one of power, not reason. The plurality opinion applies no objective criteria, and ignores relevant historical precedents in reaching a result it deems socially desirable for the "unenlightened masses." The constitutional rule advocated by the plurality today is the Texas Constitution means whatever five elected judges to this Court says it means.¹¹⁵

But since *Autran* was decided, the Texas Court of Criminal Appeals has repeatedly ignored it, returning to its original position in search and seizure cases—interpreting the United States and Texas Constitutions to have the same meaning.

The year after *Autran*, in *Crittenden v. State*, the court considered how to "review claims of pretextual seizure brought pursuant to Article I, § 9 of the Texas Constitution[.]"¹¹⁶ In adopting the same objective approach for claims under the Texas Constitution as the court had previously adopted for claims brought under the Fourth Amendment, the court explained that

we can hardly justify concluding otherwise for purposes of Article I, § 9. Indeed, we would abuse our prerogative to construe even like provisions of the state and federal constitutions differently and stretch judicial credibility to the breaking point, were we somehow to hold that what "makes more sense" for purposes

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 43, 49 (citation omitted).

¹¹⁶ 899 S.W.2d 668, 671 (Tex. Crim. App. 1995).

of the Fourth Amendment does not also "make more sense" under our own state constitutional analog.¹¹⁷

Asserting that the majority was simply "[u]nwilling to expend the effort necessary to conduct the proper analysis[.]"¹¹⁸ Judge Baird (the author of the *Autran* opinion) dissented and claimed that the Court improperly relied on two prior cases—*Goodwin v. State*¹¹⁹ and *Hamilton v. State*¹²⁰—to justify its insistence that the Court had already implicitly adopted the objective approach under the Texas Constitution.¹²¹ Concluding, Judge Baird complained that "[t]he majority's intentional misreading of our precedent, and its elevation of the Court's convenience as the primary factor in an independent state constitutional analysis is a transparent attempt to avoid mature deliberation and thoughtful resolution of the issue presented."¹²²

In *Johnson v. State*, the Texas Court of Criminal Appeals considered whether the Texas Constitution requires the court to

find that a seizure has taken place at the time a reasonable person facing a show of authority believes he or she is not free to leave . . . or, instead, at the time the suspect has actually yielded to the show of authority or been physically forced to yield . . .¹²³

The court explained that its decision rested on its determination of

whether seizure is to be defined as it was under both the Fourth Amendment and Art. I, § 9 prior to [*California v.*] *Hodari, D.*,¹²⁴ thereby maintaining for the people of Texas a broader definition of seizure under Art. I, § 9, or will seizure be defined under Art. I, § 9 as the Supreme Court in *Hodari, D.* defined it under the Fourth Amendment.¹²⁵

¹¹⁷ *Id.* at 673 (citing *Richardson v. State*, 865 S.W.2d 944 (Tex. Crim. App. 1993)).

¹¹⁸ *Id.* at 675 (Baird, J., dissenting).

¹¹⁹ 799 S.W.2d 719 (Tex. Crim. App. 1990).

¹²⁰ 831 S.W.2d 326 (Tex. Crim. App. 1992).

¹²¹ *Crittenden*, 899 S.W.2d at 675 (Baird, J., dissenting).

¹²² *Id.* at 681.

¹²³ 912 S.W.2d 227, 232 (Tex. Crim. App. 1995) (plurality opinion).

¹²⁴ 499 U.S. 621 (1991).

¹²⁵ *Johnson*, 912 S.W.2d at 232.

The court adopted "the latter interpretation of Art. I, § 9" and reasoned that "[a] plain reading . . . of the language of the Fourth Amendment and Art. I, § 9 reveals no substantive difference."¹²⁶ Although the court recognized that it was not bound to apply the Supreme Court's interpretation of the Fourth Amendment, nor was it "obliged to be different[.]"¹²⁷ the court held that the Texas Constitution did not provide greater protection than the Fourth Amendment under the circumstances.¹²⁸ But the court claimed that its holding did "not mean that this Court's decision in *Heitman* is to be reversed, or that there will be a reversion to interpreting Art. I, § 9 in lock-step with the Supreme Court's interpretation of the Fourth Amendment."¹²⁹ Judge Clinton dissented, asserting that the plurality's reason for adopting the Supreme Court's definition from *Hodari, D.* was "shallow and, ultimately, indefensible. . . . Today the Court all but abdicates its role—its only role as a discretionary review court—as 'the caretaker of Texas law.'"¹³⁰

But in *Hulit v. State*, the Texas Court of Criminal Appeals departed from Supreme Court precedent when it was asked to determine whether a peace officer violated the appellant's rights under Article I, Section 9 of the Texas Constitution when the officer asked him to step out of his truck upon finding him unconscious in his truck on a highway, and the officer observed that the appellant was disoriented and smelled of alcohol.¹³¹ The appellant urged the court not to adopt, as the court of appeals did when affirming the trial judge's decision to deny his motion to suppress, the community caretaking exception to the warrant requirement of Article I, Section 9 as the appellant asserted had been adopted in *Harris v. United States*¹³² by the Supreme Court.¹³³ The court considered the appellant's arguments and held that

¹²⁶ *Id.*

¹²⁷ *Id.* at 233.

¹²⁸ *Id.* at 233-34.

¹²⁹ *Id.* at 234.

¹³⁰ *Id.* at 237 (Clinton, J., dissenting) (quoting *Arcila v. State*, 834 S.W.2d 357, 360 (Tex. Crim. App. 1992)).

¹³¹ 982 S.W.2d 431, 432 (Tex. Crim. App. 1998).

¹³² 331 U.S. 145 (1947).

¹³³ *Hulit*, 982 S.W.2d at 434.

Article I, Section 9 of the Texas Constitution contains no requirement that a seizure or search be authorized by a warrant, and that a seizure or search that is otherwise reasonable will not be found to be in violation of that section because it was not authorized by a warrant.¹³⁴

The court determined that the arrest was reasonable, stating: "We do this, not by finding that there is a community care-taking exception to a warrant requirement, but by asking whether, from the totality of the circumstances, after considering the public and private interests that are at stake, their action was an unreasonable seizure."¹³⁵ The court then reiterated *Heitman's* mandate:

Harris is about the Fourth Amendment to the United States Constitution, and we have "expressly conclude[d] that this Court, when analyzing and interpreting Art. I, § 9, Tex. Const., will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue." To decide whether the appellant's argument is correct, we must decide whether his assertions are true for the Texas Constitution.¹³⁶

The court concluded by highlighting its departure from Supreme Court precedent:

We understand that our holding means that Section 9 of our Bill of Rights does not offer greater protection to the individual than the Fourth Amendment to the United States Constitution, and it may offer less protection. But our holding is the construction that is faithful to the Constitution which our people have adopted, and it is our duty to interpret that Constitution independent of the interpretations of federal courts.¹³⁷

And in *State v. Ibarra*, the Texas Court of Criminal Appeals again deviated from Supreme Court precedent, this time finding greater protection in the Texas Constitution than in the Fourth Amendment.¹³⁸ The court echoed *Autran* by holding that the

¹³⁴ *Id.* at 436.

¹³⁵ *Id.* at 438.

¹³⁶ *Id.* at 434 (citing *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991)).

¹³⁷ *Id.* at 436-37.

¹³⁸ 953 S.W.2d 242, 243 (Tex. Crim. App. 1997).

Texas Constitution required a higher standard of proof in demonstrating voluntariness of consent than the Supreme Court required under the Fourth Amendment.¹³⁹ Although the court had previously determined that voluntariness must be proven by clear and convincing evidence,¹⁴⁰ the State argued in *Ibarra* that, under the *Autran* factors, the court should reevaluate its interpretation of the Texas Constitution and require proof by only a preponderance of the evidence, as the Supreme Court had interpreted the United States Constitution.¹⁴¹

The court refused to "undermine years of well-established precedent" by lowering the standard of proof.¹⁴² The court noted that it had consistently applied a higher standard of proof and that, when it had decided earlier cases, the court was likely "well aware that the Supreme Court has held that the burden of preponderance of the evidence does not offend the Fourth Amendment."¹⁴³ After reviewing its concerns about adopting a lower standard, the court determined that the demands of Article I, Section 9 of the Texas Constitution could not be satisfied by a standard lower than clear and convincing evidence, and the State failed to provide "any compelling reason to depart from the standard of proof we have heretofore demanded that the State meet when showing the voluntariness of a consent to search."¹⁴⁴

Apart from a few deviations, such as *Ibarra*, the Texas Court of Criminal Appeals has largely interpreted the Texas Constitution in step with the opinions of the Supreme Court of the United States addressing analogous Fourth Amendment search and seizure issues. For the reasons outlined in the following section, I believe this is, overall, the best way to handle similar state and federal constitutional provisions.

¹³⁹ *Id.*

¹⁴⁰ *Paprskar v. State*, 484 S.W.2d 731, 737 (Tex. Crim. App. 1972).

¹⁴¹ *Ibarra*, 953 S.W.2d at 243 (citing *United States v. Matlock*, 415 U.S. 164 (1974)).

¹⁴² *Id.* at 244.

¹⁴³ *Id.* at 245.

¹⁴⁴ *Id.*

V. JUSTIFICATIONS FOR THE LOCKSTEP APPROACH

“Under ‘lockstep’ analysis[,] state courts bind the meaning of state constitutional provisions to their parallel federal counterparts, either case by case or as a broad rule.”¹⁴⁵ So if a state provision is tantamount to the federal provision, then a violation of one is a violation of the other, and satisfying one is satisfying the other. Because the Supreme Court of the United States is infallible because it is final¹⁴⁶—and if it says the Federal Constitution is or is not violated—then if equals are equals, it would either be a violation or not of the state constitution. Nevertheless, many judges, legal scholars, and lawmakers zealously encourage states to interpret their constitutions as providing greater protection for individuals than their federal counterpart.

To say that there is a historical basis for state constitutions being more protective than the Federal Constitution is ridiculous. The exclusionary rule started in federal courts and was then expanded to the states. And the foundation of the rule—substantive due process—has been expanded to the states only bit by bit. Now that the federal protection is not continuing to expand, defense attorneys try to argue that states have historically interpreted their constitutions to extend more rights to the accused. This “second bite at the apple” approach to state constitutional interpretation is nothing more than a thinly disguised pretext for exercising “judicial creativity.”

VI. CONCLUSION

It seems to me that those who advocate state expansion of the protections afforded by the Constitution of the United States often disregard the rights of the victims and potential victims and fail to critically examine the justification for, and ramifications of, the exclusionary rule. They do not consider whether legislation permitting lawsuits against governmental entities serves as more of a deterrent to police misconduct than the exclusionary rule. The United States Constitution as interpreted by the Supreme Court of the United States adequately protects the right of the

¹⁴⁵ Long, *supra* note 2, at 48-49.

¹⁴⁶ Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result).

individual to be free from unreasonable searches and seizures, while, at the same time, protecting society from predators.

SHOULD STATE COURTS DEPART FROM THE FOURTH AMENDMENT? SEARCH AND SEIZURE, STATE CONSTITUTIONS, AND THE OREGON EXPERIENCE

*Jack L. Landau**

The symposium poses a question: "Should state courts depart from the Fourth Amendment?" In this article, I answer that question in two ways. First, I address it more or less in the abstract—should any state depart from the Fourth Amendment? Second, I move to a more concrete consideration of the law of my own state, as an example of how one state has departed from the Fourth Amendment regularly and survived to tell the tale.

I. THE QUESTION IN THE ABSTRACT: SHOULD STATES DEPART?

Let us begin with the abstract question whether states, any states, should depart from federal search and seizure law. At the outset, I would like to suggest, perhaps ungraciously, that that is the wrong question. The proper question is not whether state search and seizure provisions *should* depart from Federal Fourth Amendment case law. The proper question is whether state constitutions *do* depart from Federal Fourth Amendment case law.¹

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¹ Even that reformulation of the question is not quite correct, as it arguably assumes that the Federal Constitution is a starting point for search and seizure analysis, from which the state constitution then may or may not depart. In my view, the starting point for search and seizure analysis should be the state constitution. If, and only if, the state constitution is not dispositive should the courts turn to the Federal Constitution because, as a matter of both history and logic, state constitutional analysis should always come first. See *generally infra* Part I.A.1. and accompanying text. The reformulation of the question (as well as the original, for that matter) also appears to assume that the state and federal search and seizure provisions are identically worded, which is not

The question, in other words, is what state constitutions *mean*. They may or may not end up meaning the same thing as their federal counterpart.² But it is not a matter of choice about whether it is a good thing to have a unified system of criminal procedure. It is a question of state constitutional interpretation determined in the way judges on state courts ordinarily determine the meaning of their state constitutions.³

To ask whether state constitutional search and seizure provisions *should* depart from Federal Fourth Amendment case law implicitly assumes one of two things about state constitutional interpretation—namely, either that state constitutions are less than truly “constitutional” (and, consequently, are not subject to the ordinary rules of constitutional interpretation) or that there is something special about the search and seizure provisions of state constitutions that makes their interpretation subject to different rules from the ones that apply to other provisions of state constitutions.

I suggest that neither of those two possibilities is tenable. State constitutions are “constitutional.” They have the force of constitutional law. They must be interpreted and enforced by courts as constitutional law. And search and seizure provisions are no less a part of that constitutional law than any other provisions of a state’s constitution. Let me explain why I suggest such categorical conclusions.

necessarily the case. *See infra* notes 67-68 and accompanying text. *See also* Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

² I do not suggest that there is anything wrong with a state court concluding as a matter of state constitutional interpretation that a given provision has the same meaning that a federal court has given a parallel provision of the Federal Constitution. *See* Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991) (“There is nothing improper in concluding that the [United States] Supreme Court’s construction of a similar text is sound. Adoptionism is not per se unjustifiable.”).

³ As Hans Linde explained:

The right question is not whether a state’s guarantee is the same as or broader than its federal counterpart as interpreted by the [United States] Supreme Court. The right question is what the state’s guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state’s law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it had been raised.

E Pluribus—Constitutional Theory and State Courts, 18 GA. L. REV. 165, 179 (1984).

A. *Are State Constitutions "Constitutional"?*

I begin with the contention that state constitutions are "constitutional." I am aware of the fact that some eminent constitutional scholars have suggested that state constitutions are not in fact "constitutional" and, as a result, are not subject to the sort of interpretive endeavor in which federal judges engage with respect to the Federal Constitution. Professor Paul Kahn, for example, has suggested that the notion that state constitutions represent independent and unique sources of law reflects "anachronistic beliefs about state sovereignty" that cannot be reconciled with "modern American constitutionalism."⁴ For another example, Professor James A. Gardner, a frequent and thought provoking writer in the field of state constitutional law, has suggested that state constitutions do not satisfy the basic Lockean requirements of "constitutional positivism," that is, the notion that state constitutions have legitimacy as "fundamental" law.⁵

It is tempting to dismiss such suggestions with a quick kick at the bench in my courtroom and, like Dr. Johnson responding to Bishop Berkeley's subjective idealism after kicking a stone, simply declare that "I refute it thus."⁶ But these serious, sometimes elegant, arguments are worth more careful scrutiny.

In brief, it strikes me that each of the arguments proceed, however elegantly, from debatable premises. Kahn, for example, complains that the notion of states as sovereign and inde-

⁴ Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147, 1150 (1993).

⁵ James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1249-53 (2005); see also James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1028-30 (1993) ("[S]tate constitutions, to put it bluntly, are not 'constitutions' as we understand the term."). Gardner developed the point more completely in his recent book, JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005). Gardner, particularly in his more recent work, does not suggest that there is no place for state constitutionalism at all. *Id.* He suggests instead that state constitutional interpretation must be understood in the context of the role of states as "agents of federalism" under appropriate, and limited, circumstances. *Id.* at 228-67; see also Jim Rossi, *Book Review: The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 224 (2006) (questioning whether Gardner's view of federalism "is overly myopic for state constitutionalism and may limit its path").

⁶ JAMES BOSWELL, *LIFE OF JOHNSON* 333 (R.W. Chapman ed. 1998).

pendent sources of law “does not easily fit within the larger trends in the development of constitutional law” that emphasize the centralization of political authority.⁷ He suggests that, public life “is experienced in and through the national community,” while local governments are “now often identified with prejudice, discrimination, censorship, and ideological rigidity,” to be remedied by resort to the federal government for protection against such restraints on personal liberty.⁸ In fact, more recent trends are rather notably to the contrary, as recent United States Supreme Court federalism decisions⁹ and state court decisions concerning the subject of same-sex marriage¹⁰ illustrate.

Gardner’s argument rests conspicuously on a definition of constitutionalism that assumes that constitutions must be the product of a voluntary choice of autonomous and *independent* individuals.¹¹ Because the members of states are subject to the supreme, national government, they are not independent; as a

⁷ Kahn, *supra* note 4, at 1148.

⁸ *Id.* at 1149; see also Michael E. Solimine & James L. Walker, *Federalism, Liberty, and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1468 (1997) (“Whatever may have been true in the past, in this century it is unrealistic to contend that each state has a distinctive political or social culture, especially one that differs in important ways from national culture.”).

⁹ In the last dozen years, for example, the Supreme Court has struck down a number of congressional enactments on the ground that they infringe on state power and authority. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000); *Printz v. United States*, 521 U.S. 898, 935 (1997); *United States v. Lopez*, 514 U.S. 549, 566-68 (1995). Such recent case law developments have prompted renewed interest in, among other things, state and local government environmental regulation. See, e.g., Scott Josephson, *This Dog Has Teeth . . . Cooperative Federalism and Environmental Law*, 16 VILL. ENVTL. L.J. 109 (2005); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 93 IOWA L. REV. 545 (2007); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).

¹⁰ See generally Jeffrey L. Amestoy, *Foreward: State Constitutional Law Lecture: Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249 (2004); William R. Castro, *Our Unwritten Constitution and Proposals for a Same-Sex Marriage Amendment*, 38 CREIGHTON L. REV. 271 (2005); Joseph R. Grodin, *Same-Sex Relationships and State Constitutional Analysis*, 43 WILLAMETTE L. REV. 235 (2007); Robert F. Williams, *Old Constitutions and New Issues: National Lessons From Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73 (2001).

¹¹ According to Gardner, “[i]f constitutional positivism is to be available as a theoretical framework for an interpretational methodology, the answer must be that a state’s constitution ‘belongs’—uniquely, determinately, and by virtue of a process of independent and voluntary self-construction—to the people of the state, and to them alone.” Gardner, *Whose Constitution Is It*, *supra* note 5, at 1254 (emphasis added).

result, Gardner concludes the government that their state constitutions describe is not "constitutional" in the sense that he defines it.¹² Such reasoning strikes me as circular. If one defines "constitutional" in a way that clearly excludes state constitutions, it comes as no surprise that state constitutions are not "constitutional."¹³

Arguments that state constitutions are not "constitutional" also seem to be predicated, in substantial part, on refutations of caricatures of arguments in favor of state constitutionalism. Gardner, for example, has spent much energy refuting the notion that a principal justification for state constitutionalism is what he terms "romantic subnationalism," the idea, supposedly rooted in the German philosophical tradition of Hegel and Fichte, that a state constitution is a reflection of a "unique state character" or a "set of indigenous fundamental values."¹⁴ He asserts that the notion that any state reflects such a unique character cannot be reconciled with "the most glaringly obvious features of modern American society," such as its remarkable mobility, the dominance of national media and mass marketing, and increasing globalization of economic activity.¹⁵

Among the problems with this argument is that it does not rest on an accurate portrayal of arguments in favor of state constitutionalism. To be sure, a number of judges and commentators writing in support of state constitutionalism note that state constitutions often reflect "cultural values distinctively their own."¹⁶ This observation seems unremarkable to me. Some states include in their constitutions guarantees of rights that others do not.¹⁷ It strikes me as rather commonplace to

¹² *Id.* at 1255.

¹³ See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 186 (1998) ("The primary problem with Gardner's critique, however, is its unduly narrow view of constitutionalism.").

¹⁴ See generally GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 5, at 61-62.

¹⁵ *Id.* at 69.

¹⁶ See, e.g., Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 423 (1987).

¹⁷ A number of state constitutions include provisions pertaining to the rights of the poor, rights to public education, rights to housing, and the like. The New York Constitution, for instance, declares that the legislature must "provide for aid, care and support of the needy." N.Y. CONST., art. XVII, § 1. Other state constitutions, such as Oregon's, do

suggest that the differences in those constitutional texts may reflect differences in values among those who ratified them. I am not aware of anyone, however, who argues, as Gardner posits, that the legitimacy of state constitutionalism rests on a notion that each of the fifty states represents some sort of unique, uniform, and immutable state "character."¹⁸ To the contrary, as Professor Jennifer Friesen suggests,

State declarations of individual rights have histories and qualities that differ, to a greater or lesser degree, from each other and from the first ten amendments to the Federal Constitution; however, what really "counts" in state constitutional

not. See generally Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-96 (1989) (discussing such state constitutional provisions and their enforcement in the courts). Closer to the topic of this paper, the Montana Constitution includes a unique provision declaring that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST., art. II, § 10. In light of that constitutional wording, the Montana Supreme Court, not surprisingly, has concluded that "the range of warrantless searches which may be lawfully conducted under the Montana Constitution is narrower than the corresponding range of searches that may be lawfully conducted pursuant to the federal Fourth Amendment." *State v. Hardaway*, 36 P.3d 900, 910 (Mont. 2001) (citing *State v. Elison*, 14 P.3d 456 (Mont. 2000)). The Washington Constitution likewise includes a uniquely worded provision that declares that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST., art I, § 7. The Washington courts have concluded that, in light of that wording, "the protections guaranteed by article I, section 7, of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution." *State v. McKinney*, 60 P.3d 46, 48 (Wash. 2002) (citing *City of Seattle v. McCready*, 868 P.2d 134 (1994)).

¹⁸ In any event, it is not clear to me that Gardner has proven that, in fact, the different states do not reflect recognizably different political cultures. It strikes me that the mere facts of increased mobility, nationalized media, and globalized economies do not refute the notion that there nevertheless persist significant differences between the states in their legal and political cultures. To pick only one of many possible examples, two dozen states have adopted some form of direct democracy, while the balance have not. See David B. Magleby, *Direct Legislation in the American States*, in REFERENDUMS AROUND THE WORLD 218 (David Butler & Austin Ranney eds. 1994). There can be no question but that the availability of the initiative and referendum has had profound consequences for those states permitting direct democracy, often expressed on constitutional terms, regarding such matters as of education funding, property tax reform, automobile insurance rates, physician assisted suicide, property rights, and criminal victims' rights, to say nothing of the process of lawmaking itself. To assert that people are increasingly mobile and watch national news, in other words, does not explain away the very real differences in legal and political culture between, say, Oregon, where, for instance, the powers of initiative and referendum exist, physician-assisted suicide is lawful, same-sex civil unions are permitted, property taxation is constitutionally limited, and Georgia, where none of those is the case.

interpretation is often not truly unique to one state. Independent interpretation does not require uniqueness; nor are differences in a state's political or cultural makeup relevant unless they are differences that demonstrably influenced the making of constitutional choices in an original or amended document.¹⁹

Apart from that, so far as I can tell, the arguments against state constitutionalism *simpliciter* do not address two powerful arguments in support of it, one historical and one logical. Let us turn to those arguments.

1. Historical Argument

Historically, state constitutions came first. Even before the Federal Constitution was ratified, the states had adopted their own constitutions.²⁰ (By 1783, thirteen states had constitutions, all but Rhode Island, which retained its colonial charter.)²¹ The Second Continental Congress actually had contemplated the idea that state constitutions should be uniform, but it rejected the notion in favor of allowing each state to craft its own.²² (Apparently, the delegates could not agree on what a model state constitution should look like.)²³

In that regard, it may be worthwhile recalling that the Federal Constitution was patterned after the state constitutions, not vice versa.²⁴ And, similarly, the Federal Bill of Rights was modeled after state bills of rights.²⁵ As Willi Paul Adams notes in his

¹⁹ Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1074 (1997).

²⁰ See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (expanded ed. 2001); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980).

²¹ For an excellent overview of eighteenth-century state constitutionalism, see TARR, *supra* note 13, at 60-93 (1998); see also Gordon Wood, *State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911 (1982).

²² ADAMS, *supra* note 20, at 49; see also FLETCHER M. GREEN, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES 1776-1860* 52-56 (1930).

²³ ADAMS, *supra* note 20, at 54.

²⁴ *Id.* at 289 ("The Federalists of 1787 created political institutions on the national level that were firmly based on a pattern already existing on the state level.").

²⁵ See BERNARD SCHWARTZ, 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 383 (1971) ("It is a fiction too long accepted that provisions in state constitutions textually

history of early state constitutions, "When the first ten amendments substituted for a formally separate Declaration of Rights in 1791, not a single right was codified that had not previously been listed in one of the state bills of rights or constitutions. . . ."²⁶ More important, the adoption of the Bill of Rights did not supplant the state constitutional guarantees of individual rights.²⁷

In fact, it was not until after the Civil War that the Fourteenth Amendment was adopted, and it was not until the twentieth century that selective incorporation was invoked to apply portions of the Federal Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment.²⁸ In the

identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise; the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.").

²⁶ ADAMS, *supra* note 20, at 299. See also AKHIL REED AMAR, *THE BILL OF RIGHTS* 205 (1998) ("With a few exceptions . . . the substance of the federal Bill's rights and freedoms did not greatly diverge from rights already formally protected under state laws and state constitutions.").

²⁷ To the contrary, as the United States Supreme Court made clear in *Barron v. City of Baltimore*, 32 U.S. 243 (1833), the Federal Bill of Rights did not apply to the states.

²⁸ The United States Supreme Court rejected the notion that the Fourteenth Amendment Privileges and Immunities Clause made the Federal Bill of Rights applicable to the states in *The Slaughterhouse Cases*, 83 U.S. 36 (1872). For the next quarter century, the Court consistently rejected the contention that the Fourteenth Amendment incorporated the Federal Bill of Rights against the states. See, e.g., *McElvaine v. Brush*, 142 U.S. 155 (1891) (holding that the Fourteenth Amendment did not incorporate the Eighth Amendment Cruel and Unusual Punishment Clause); *Spies v. Illinois (Ex Parte Spies)*, 123 U.S. 131 (1887) (explaining that the Fourteenth Amendment did not incorporate the Fourth Amendment search and seizure clause or the Fifth Amendment right against self-incrimination); *Hurtado v. California*, 110 U.S. 516 (1884) (stating that the Fourteenth Amendment did not incorporate Fifth Amendment right to grand jury indictment). In 1897, the Court held in *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897), that the Fourteenth Amendment *did* incorporate the Takings Clause of the Fifth Amendment. The Court then appeared to reverse course and, for another quarter-century, reverted to its earlier holdings. See, e.g., *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530 (1922) (finding that the Fourteenth Amendment did not incorporate the First Amendment free speech guarantee); *Twining v. New Jersey*, 211 U.S. 78 (1908) (holding that the Fourteenth Amendment did not incorporate Fifth Amendment right against self-incrimination); *Maxwell v. Dow*, 176 U.S. 581 (1900) (finding that the Fourteenth Amendment did not incorporate the Sixth Amendment right to criminal jury trial). It was not until the 1920s that the Court again changed course, this time for good, holding that a number of specific rights enumerated in the Federal Bill of Rights have been "selectively" absorbed into the Due Process Clause of the Fourteenth Amendment. See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969) (applying to the states the Fifth Amendment right against double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (applying to the states the Fifth Amendment right against self-incrimination); *Wolf v. Colorado*, 338 U.S. 25 (1949) (applying to the states the Fourth

meantime, the states decided matters of individual rights, and, in particular, search and seizure—that did not involve federal law enforcement pursuant to their own constitutions.²⁹ For over one hundred years, no one thought twice about whether state constitutions had the force of law or had legal significance apart from the Federal Constitution or cases construing it.³⁰

To be sure, the state courts often have construed their state constitutions to be coextensive with parallel provisions of the Federal Constitution, but not always. For example, before the United States Supreme Court decided *Weeks v. United States*,³¹ courts in several states recognized an exclusionary rule.³² And, even more interestingly, after *Weeks*, a majority (twenty-seven states by 1949) refused to read their own search and seizure provisions to require the exclusion of illegally obtained evidence.³³

It was not until 1949, in *Wolf v. Colorado*,³⁴ that the United States Supreme Court held that the Fourth Amendment's search and seizure provision applied to the states, and not until 1961, in *Mapp v. Ohio*,³⁵ that it applied the exclusionary rule to them as well. So, for a century and a half, the state courts interpreted their own state constitutional search and seizure provisions to have independent legal significance.

Even with the advent of selective incorporation, it was never suggested that the Fourteenth Amendment superseded the authority of state constitutions or state court interpretation of those

Amendment right to be free from unreasonable search and seizure); *Fiske v. Kansas*, 274 U.S. 380 (1927) (applying to the states the First Amendment guarantee of freedom of speech).

²⁹ For an interesting account of the impact of incorporation of the criminal procedure provisions of the Federal Bill of Rights on state jurisprudence, see generally Kenneth Katkin, "Incorporation" of the *Criminal Procedure Amendments: The View from the States*, 84 NEB. L. REV. 397 (2005).

³⁰ See generally Robert K. Fitzpatrick, *Neither Icarus nor Ostrich: State Constitutions as Independent Sources of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1836 (2004) ("[F]or the first 175 years after the adoption of the federal Constitution, state constitutions were the primary guarantors of individual rights.").

³¹ 232 U.S. 383 (1914).

³² See, e.g., *Hammock v. State*, 58 S.E. 66 (Ga. Ct. App. 1907); *State v. Height*, 91 N.W. 935 (Iowa 1902); *Blum v. State*, 51 A. 26 (Md. 1902); *State v. Slamon*, 50 A. 1097 (Vt. 1901).

³³ See Katkin, *supra* note 29, at 415-18 (citing cases).

³⁴ 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁵ 367 U.S. 643 (1961).

constitutions, so long as the state court rulings were at least as protective of individual rights guaranteed by the Federal Constitution. To the contrary, as early as 1940, in *Minnesota v. National Tea Co.*, the Supreme Court noted that “[i]t is fundamental that state courts must be left free and unfettered by us in interpreting their state constitutions.”³⁶ More recently, in *California v. Greenwood*, the Court explained that “[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.”³⁷ In fact, it has long been the law that when a state court decision rests on a clearly stated “independent state ground” such as a state constitutional provision that is more protective of individual rights than the Federal Constitution, the Supreme Court regards itself as lacking jurisdiction even to review the matter.³⁸

With *Wolf* and *Mapp*, however, the federal courts began to interpret the Fourth Amendment more liberally than the states had interpreted their state search and seizure provisions. As a result, a generation of judges began to forget about state constitutionalism.³⁹ It was not until fifteen years later, with the emergence of a more conservative Burger Court, that a “New Judicial Federalism” emerged.⁴⁰ Actually, it was not new at all. If any-

³⁶ 309 U.S. 551, 557 (1940).

³⁷ 486 U.S. 35, 43 (1988). See also *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.”); *Cooper v. California*, 386 U.S. 58, 62 (1967) (“Our holding, of course, does not affect the State’s power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.”).

³⁸ *Michigan v. Long*, 463 U.S. 1032, 1038-39 (1983). The rule dates back at least to *Fox Film Corporation v. Muller*, 296 U.S. 207, 210 (1935), in which the Court declared that “where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is . . . adequate to support the judgment.”

³⁹ See generally JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* § 1-1 n.11 (1992) (“A generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of Warren Court decisions left state constitutional law in a condition of near atrophy in most states.”); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976) (noting that state courts fell “into the drowsy habit of looking no further than federal constitutional law”).

⁴⁰ Justice William J. Brennan, Jr. is usually given credit for initiating the state constitutional “revolution” with the publication of his article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Actually, a number of scholars had been calling for a return to judicial federalism before that. Hans Linde, for

thing, the period of lockstep federal-state constitutionalism was the new phenomenon. Judicial federalism represents a return to fundamentals.⁴¹

2. Logical Argument

Let us turn to the argument about why logic requires independent state constitutional decisions. There are essentially two arguments to consider. First, there is Hans Linde's argument that it is inappropriate even to reach a federal constitutional question until it is first determined that the state constitution does not afford complete relief. According to Linde and to the Oregon Supreme Court, which adopted the argument, provisions of the Federal Bill of Rights apply only when there is a denial of due process.⁴² There can be no denial of due process, however, if state law affords complete relief. As a result, a state court is compelled to look first to its own state constitutional law to determine whether the state law affords relief. Only if the state law does *not* afford complete relief is there the requisite denial of

example, argued for recognition of the independent significance of state constitutions as early as 1970. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970). Other early calls for the recognition of state constitutionalism include Jerome B. Falk, *The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969); Howard, *supra* note 39. It is generally recognized that, although some may have been calling for a return to state constitutionalism fairly early on, it was the jurisprudence of the Burger and Rehnquist Courts that precipitated the re-emergence of state constitutionalism. See, e.g., Stanley H. Friedelbaum, *Advances and Departures in the Criminal Law of the States: A Selective Critique*, 69 ALB. L. REV. 489, 489-95 (2006).

⁴¹ See generally Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Fitzpatrick, *supra* note 30, at 1835-36 ("Although judicial federalism has been a controversial topic since the mid-1970's, invocation of state constitutions to protect individual rights was in fact the historical norm for much of the nation's existence.").

⁴² Linde, *Without "Due Process," supra* note 40, at 133; see also Linde, *First Things First, supra* note 20, at 383. Linde's "first things first" approach was expressly adopted by the Oregon Supreme Court in *Sterling v. Cupp*, in which the court explained:

The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.

625 P.2d 123, 126 (Or. 1981).

due process that permits reference to the Federal Bill of Rights. Thus, argues Linde, it is necessarily implied not only that state law has independent validity, but also that it has *primacy*.⁴³

The second argument is that it is logically impossible not to give state constitutions independent significance. Consider the following example. Suppose that, some time ago, the United States Supreme Court determined that police searching your garbage at the curb do engage in a “search” within the meaning of the Fourth Amendment. Suppose that, shortly after that decision is handed down, your state supreme court confronts the question whether searching the same sort of garbage at the curb is a search within the meaning of the search and seizure provisions of the state constitution. If you are a “lockstep” state, the answer is easy: The state court follows the federal court, and the state search and seizure provision henceforth applies to a search of garbage cans at the curb.

Now suppose that, some time after that, the United States Supreme Court changes its mind, so that (as it, in fact, determined in *California v. Greenwood*⁴⁴) the search of garbage at the curb *is not* a search within the meaning of the Fourth Amend-

⁴³ Although the logic of state constitutionalism suggests the analytical primacy of state constitutions, not all state courts that have expressed a commitment to the independent significance of state constitutions have followed that commitment to its logical conclusion. A number have determined that, for a variety of policy reasons, something short of primacy is appropriate. Some courts have adopted a “limited lockstep approach,” by which they permit themselves to depart from the Fourth Amendment when differences in wording, history, and common-law context of the state constitutional counterpart suggest a different interpretation is warranted. See, e.g., *People v. Caballes*, 851 N.E.2d 26, 43 (Ill. 2006). In a similar vein, some have adopted what has become known as the “interstitial” approach, by which federal court interpretations of the Fourth Amendment are accorded a presumptive validity with respect to the interpretation of parallel state constitutional provisions, the presumption being rebuttable in reference to a series of factors. See, e.g., *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997); *State v. Williams*, 459 A.2d 641, 653-59 (N.J. 1983). The Minnesota Supreme Court, in fact, has developed a “decision tree” detailing the circumstances under which the court will decide state constitutional issues. *Kahn v. Griffin*, 701 N.W.2d 815, 824-25 (Minn. 2005); see also Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota’s Approach to Protecting Individual Rights under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865 (2007). Some judges and commentators have advocated a “dual sovereignty” approach, requiring analysis of both state and federal grounds. See, e.g., Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Issues on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

⁴⁴ 486 U.S. 35 (1988).

ment. The question becomes, what does the state constitutional search and seizure provision now mean? Before the United States Supreme Court changed its mind, the state provision meant one thing; did it magically transform the moment that the United States Supreme Court decided differently? Of course not. At the very least (certainly, for police and lower courts), the meaning of the state provision remains as the state supreme court previously interpreted it until the state supreme court decides otherwise. In other words, the state constitutional provision has independent significance, and it cannot logically be otherwise.

*B. Is There Something Special About
"Search and Seizure" Provisions?*

Let us move to the question whether—even if state constitutions generally have independent legal significance—there is something about search and seizure provisions in particular that suggests that they should be interpreted in lockstep uniformity with Federal Fourth Amendment cases. I am aware of a number of policy arguments why independent interpretation of state search and seizure provisions is not to be recommended. In general, those arguments may be grouped into two categories—*incoherence* and *fragmentation*. Let us take each one in turn.

1. The Incoherence Complaint

The first argument is that state search and seizure law is *incoherent*. Professor James Gardner, for example, once characterized state constitutional law generally as “a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.”⁴⁵ The criticism may well be warranted. In fact, I have complained that state courts generally, and my own state’s courts particularly, have been inconsistent in their interpreta-

⁴⁵ James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992). See also James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 244 (1996) (referring to the “perplexing melange of disparate constitutional principles” reflected in state constitutional decisions).

tions of state constitutions and in their commitments to those interpretations.⁴⁶

But it is one thing to complain that a state's constitutional decisions are incoherent. It is another thing to suggest that, because they are incoherent, *the answer is to turn to federal law*. The assumption of critics of state constitutionalism seems to be that federal search and seizure law is less incoherent. I, for one, have yet to see anyone establish that.⁴⁷ To the contrary, the United States Supreme Court's Fourth Amendment case law is regularly decried on the ground that it is, to quote one authority, "arbitrary, unpredictable, and often border[ing] on [the] incoherent."⁴⁸ To quote another, the Court's case law is "a mass of contradictions and obscurities."⁴⁹ Still another, "The Fourth Amendment today is an embarrassment."⁵⁰ Or my favorite, that each

⁴⁶ See generally Jack L. Landau, *Hurrah for Revolution: A Critical Analysis of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000). See also Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 86 (2006) (examining deviations from state constitutionalism in the case law from Oregon, Washington, New Jersey, and New Hampshire, and concluding that "even states with the greatest rhetorical commitment to consistently autonomous state constitutionalism depart from their stated approach sometimes"); John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law: Why Don't the "Primacy" States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 (1993).

⁴⁷ As my colleague Judge David Schuman has suggested, "Perhaps I am more reluctant . . . to abandon 'impoverished' state constitutionalism in favor of its 'successful,' 'rich,' and 'vigorous' federal analogue because I find recent *federal* constitutionalism to be impoverished—not because it is increasingly conservative, but because it is increasingly petulant, shrill, formulaic, and intellectually incoherent." David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 277 n.18 (1992). Aside from that, opponents of state constitutionalism appear to assume that adherence to federal doctrine will result in consistent application of the law, when experience seems to suggest that that is not always the case. See, e.g., Richard C. Miller, *Begging to Defer: Lessons in Judicial Federalism from Colorado Search-and-Seizure Jurisprudence*, 76 U. COLO. L. REV. 865 (2005) (analyzing the tendency of Colorado courts to follow federal search and seizure doctrine, but differ substantially in application of the doctrine). In fact, it appears that, even when a state constitution expressly requires state courts to conform state search and seizure law to Fourth Amendment law, as is the case in Florida, the results are less than perfect conformity. See generally Thomas C. Marks, Jr., *Now You See It, Now You Don't, Privacy and Search and Seizure in the Florida Constitution: Trying to Make Sense Out of a Tangled Mess*, 67 ALB. L. REV. 691 (2004).

⁴⁸ David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47 (2005).

⁴⁹ Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).

⁵⁰ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

new Fourth Amendment case is like “more . . . duct tape on the Amendment’s frame and a step closer to the junkyard.”⁵¹ The criticism that state court constitutional jurisprudence is less than coherent, then, may justify trying to make it better. However, it hardly justifies abandoning it altogether in favor of lockstep adherence to federal cases.

2. The Fragmentation Complaint

The second argument in favor of lockstep interpretation of search and seizure provisions is that independent state interpretation unnecessarily fragments criminal procedure. As Professor James Diehm complains, “New Federalism has led to the fragmentation of constitutional criminal procedure jurisprudence. On a multitude of issues, the federal courts and the courts of each of the fifty states are reaching different conclusions based on different constitutions.”⁵² This concern about fragmentation has a number of different aspects.

To begin with, there is the assertion that fragmentation is, well, just bad. As Diehm complains,

[o]n an intuitive and theoretical level, maintaining consistency in court decisions on constitutional issues is appealing. . . . [E]ven when specific [constitutional] terms differ, all citizens should be governed by the same constitutional principles. The result is troublesome when an accused in state court is freed as a result of the suppression of evidence, while across the street in federal court another defendant is convicted and sentenced on the same facts.⁵³

Or, as Justice Daniel O’Hern of the New Jersey Supreme Court succinctly put it, “[t]he fourth amendment is the fourth amendment. It ought not to mean one thing in Trenton and another across the Delaware River in Morrisville, Pennsylvania.”⁵⁴

⁵¹ Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787-88 (1999).

⁵² Diehm, *supra* note 45, at 244.

⁵³ *Id.* at 245 (footnotes omitted).

⁵⁴ *State v. Hempele*, 576 A.2d 793, 816 (N.J. 1990) (O’Hern, J., concurring in part and dissenting in part). *See also* *People v. Gonzalez*, 465 N.E.2d 823, 825 (N.Y. 1984) (“We deem it desirable to keep the law of this State consistent with the Supreme Court’s rulings on inventory searches[.]”); *People v. Brisendine*, 531 P.2d 1099, 1117 (Cal. 1975)

Then there is the contention that fragmentation is hard on law enforcement. According to critics of state constitutionalism, "[f]ederal and state agents cannot be expected to master and comply with the conflicting laws of fifty states."⁵⁵

There is also the contention that fragmentation leads to the manipulation of criminal procedure. Usually cited in that regard is the so-called "silver platter" problem, that is the possibility that state officials who obtain evidence illegally, under state but not federal law, may avoid suppression of the evidence by giving it to federal officials not subject to the same constraints "on a silver platter," and vice versa.⁵⁶

Finally, there is the contention that fragmentation in criminal procedure law will result in an increase in litigation. According to critics, "an issue will not be finally resolved until all of the highest state courts and the United States Supreme Court have decided the issue. This will require substantially more litigation than was necessary under a unified system."⁵⁷

Let us respond to those criticisms point-by-point. To begin with, it seems to me that underlying the fragmentation critique is an unabashedly nationalist view that ignores the basic system of dual constitutionalism that is reflected in our federal system of government. States exist.⁵⁸ And state constitutions *are laws*.⁵⁹

(Burke, J., dissenting) ("To have two sets of rules under essentially identical constitutional provisions would create confusion.") (superceded by constitutional amendment as stated in *In re Lance W.*, 694 P.2d 744 (Cal. 1985)); Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L. REV. 85, 92 (1985) ("Having the interpretation of one's constitutional rights depend on which state one is in is at odds with this popular conception of immutable constitutional rights.").

⁵⁵ Diehm, *supra* note 45, at 249; *see also* Hudnut, *supra* note 54, at 93 ("Prosecutors and police need to know the rules of the game . . . [D]ifferent rules would cause confusion. Moreover, regional law enforcement projects, such as drug investigations, could become more difficult.") (citing *State v. Lowry*, 667 P.2d 996, 1005 (1983) (Jones, J., concurring)); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 995 (1979) ("The need for a single rule understood by all citizens is buttressed by the need for a uniform rule comprehensible to federal and state officers.").

⁵⁶ Diehm, *supra* note 45, at 246-47. *See also* Tom Quigley, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 285 (1988).

⁵⁷ Diehm, *supra* note 45, at 253.

⁵⁸ Even Diehm concedes that some of his proposals requiring uniform state and federal constitutional standards "would involve an attack on the basic tenets of federal-

State court judges have a sworn obligation to give those state laws authoritative interpretation.⁶⁰ That obligation cannot, in effect, be prospectively delegated to the United States Supreme Court.⁶¹ In a similar vein, it strikes me that the fragmentation argument ignores the purpose of dual sovereignty. As Madison noted in Federalist No. 51, “[i]n the compound republic of America . . . a *double security* arises to the rights of the people. The differential governments [state and federal] will control each other, at the same time that each will be controlled by itself.”⁶²

Aside from that, the fragmentation arguments seem to assume, without explanation as far as I can tell, that interpretation of search and seizure provisions is intrinsically different from the interpretation of other provisions of state constitutions. Where

ism and could raise serious Tenth Amendment questions.” Diehm, *supra* note 45, at 264 n.221.

⁵⁹ See *supra* notes 5-44 and accompanying text.

⁶⁰ See, e.g., OR. CONST. art. VII, § 7 (requiring supreme court judges to take an oath promising to support both federal and state constitutions); see also Thomas R. Bender, *For a More Vigorous State Constitutionalism*, 10 ROGER WILLIAMS U. L. REV. 621, 627 (2005) (“State supreme court judges take oaths to support and uphold their state constitutions faithfully and diligently, and are therefore obliged to faithfully and diligently apply them.”); James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1513 (1998) (state judges violate their oaths if they fail to give independent significance to state constitutions); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1168 (1985) (lockstep adherence to federal constitutional interpretation violates “the state judge’s oath to support the state constitution”) (citing *Roberts v. State*, 458 P.2d 340, 342 (Ak. 1969)); but see Long, *supra* note 46, at 66 (The “oath argument” has “strong rhetorical value, but little persuasive force” because it is “too vague a restraint on judicial power” to have practical significance).

⁶¹ See, e.g., Rex Armstrong, *State Court Federalism*, 30 VAL. U. L. REV. 493, 495 (1996) (“When I became a judge on the Oregon Court of Appeals, I took an oath to support the Oregon Constitution. That means, in a case before our court involving a challenge to the validity of a state statute under the Oregon Constitution, I am obliged to uphold the constitution. To do that, I have to decide what the constitution means. That is the task assigned to me as a state judge. I would act contrary to my oath if I turned that task over to someone else . . .”) (internal footnote omitted). For a nice summary of arguments concerning the problems with “prospective lockstepping,” see Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1520-27 (2005).

⁶² THE FEDERALIST NO. 51, at 333 (James Madison) (Robert Scigliano ed., 2000), in THE FEDERALIST PAPERS 323 (Clinton Rossiter ed., 1961) (emphasis added). See also *McCulloch v. Maryland*, 17 U.S. 316, 410 (1819) (“In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.”).

did that come from? State constitutions frequently include provisions that find no counterparts in the Federal Constitution. When a state court is required to construe such a provision, say a single-subject provision for proposed constitutional amendments,⁶³ the court will resort to ordinary principles of constitutional interpretation, including presumably an examination of the text and consideration of the historical circumstances surrounding adoption of the provision.⁶⁴ Why would a state search and seizure provision not be construed according to the same interpretive conventions? Especially when a state constitution employs language that is materially different from the Fourth Amendment, it is difficult to understand the argument in favor of lockstep constitutional construction.

In fact, the wording of state search and seizure provisions are sometimes starkly different from the wording of the Fourth Amendment, and those differences are often intentional. In fact, several contain explicit guarantees of a right to privacy that finds no counterpart in the Fourth Amendment. The Montana Constitution, for example, declares that “[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”⁶⁵

⁶³ Forty-three state constitutions include such a provision, while the Federal Constitution contains none. For a recent survey of the history of, justifications for, and litigation concerning, the meaning of single-subject provisions see Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803 (2006).

⁶⁴ See, e.g., *Armatta v. Kitzhaber*, 959 P.2d 49, 56-64 (Or. 1998) (determining meaning of single-subject and separate-amendment requirements for constitutional amendments by examination of the constitutional text, the historical context, and related case law), *overruled on other grounds by* *Swett v. Bradbury*, 67 P.3d 391 (2003); see also *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 237 (Or. 2000) (explaining that the goal of constitutional interpretation in Oregon generally is “to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it” by examining the text, the historical context for adoption, and relevant case law (quoting *Jones v. Hoss*, 285 P. 205 (1930))). It has been observed that it is generally agreed that, at least initially, in construing a provision of a state constitution, the objective is to determine the intended meaning of a particular text. Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283, 290 (2003) (“Initially, there is some degree of consensus that the overarching task is to determine the intent of voters who ratified the constitution.”). How courts define “original intent,” however, and extent to which they are bound by it, remain matters in dispute. See generally TARR, *supra* note 13, at 189-99.

⁶⁵ MONT. CONST., art. II, § 10.

New York's Constitution, for another, contains an extensive provision about the "right of the people to be secure against unreasonable interception of telephone and telegraph communications."⁶⁶

If other provisions of the state constitution are given their intended effect, I do not understand by what justification courts would decline even to consider the matter when it comes to search and seizure provisions. Suppose, for example, the citizens of my state decided that they were unsatisfied with the United States Supreme Court's decision in *Greenwood* that examining the contents of garbage at the curb is not a "search" within the meaning of the Fourth Amendment. Suppose further that they adopted an amendment to the search and seizure provisions of the Oregon Constitution to specifically state that "an examination by police officers of the contents of garbage at the curb is a search within the meaning of the search and seizure provisions of this constitution." I do not understand the reasoning by which the enactment of that constitutional amendment could be ignored.

Let us examine the more specific fragmentation arguments. The first was that, to quote one critic, "all citizens should be governed by the same constitutional principles."⁶⁷ That argument, as I have already suggested, ignores the fact that, in our system of dual sovereignty it is inevitable that there will be differences in the law from one jurisdiction to another.⁶⁸ Take, for example,

⁶⁶ N.Y. CONST., art. I, § 12.

⁶⁷ Diehm, *supra* note 45, at 245.

⁶⁸ As Professor Barry Latzer correctly has observed, it must be conceded that what he calls "rejectionism," that is, the rejection of lockstep conformity with federal constitutional interpretation, makes criminal procedure confusing:

But the blame rests on federalism itself. Despite many similarities from jurisdiction to jurisdiction, the United States has never had a totally uniform approach to criminal justice. The federal government and each state have always had separate substantive criminal laws and rules of criminal procedure. . . . At bottom, rejectionism is no more than a variation on the theme of state responsibility for the administration of criminal justice. It is a by-product of federalism, and federalism is inherently confusing.

Latzer, *supra* note 2, at 866-67; see also TARR, *supra* note 13, at 181 ("[N]either the desire to reduce legitimacy concerns nor prudential arguments for uniformity can justify the lockstep approach; for that approach is inconsistent with the nation's commitment to dual

substantive criminal law. Possession of an ounce of marijuana may be lawful in one state, a misdemeanor in another, and a felony in still another.⁶⁹ Take, for another example, statutory criminal procedure law; in some states, there are statutory limits concerning the authority of police officers to ask questions of a driver during a motor vehicle stop.⁷⁰ Variation is a longstanding and familiar part of our federal system of government.⁷¹ If uniformity were such a good idea, there would be no states.

The same answer applies to complaints that fragmentation can lead to forum shopping and silver platter problems. That may well be true.⁷² If it is, it is an unavoidable consequence of a federal system of government. Apart from that, I am not certain that the forum shopping argument is persuasive on its own

constitutionalism.”); Friesen, *supra* note 19, at 1081 ([D]iversity in state and federal criminal procedure “is a normal incident of separate sovereignties.”).

⁶⁹ In Oregon, for example, it is lawful to possess marijuana in limited quantities for personal medical use. OR. REV. STAT. § 475.319 (2005). In Colorado, possession of more than one ounce, but less than eight ounces, of marijuana may be a misdemeanor as long as the defendant has no prior drug convictions. COLO. REV. STAT. § 18-18-406(4)(a)(I) (2000). In Georgia, the possession of the same amount of marijuana is a felony. GA. CODE ANN. § 16-13-30(j) (2000).

⁷⁰ In Oregon, for example, for many years, statutes limited the scope of questioning in which police officers may engage during the course of a traffic stop. Under OR. REV. STAT. § 810.410(3) (1993), police officers could question the person stopped only to investigate the traffic infraction itself. *See State v. Dominguez-Martinez*, 895 P.2d 306 (Or. 1995) (without some basis other than the infraction, officers cannot ask questions about such matters as the possession of drugs, weapons, contraband, and the like). The statutes were later amended so that officers are now permitted to make inquiries to ensure the safety of the officers, and to determine whether the persons stopped possess weapons. OR. REV. STAT. § 810.410(3) (2005). Other examples of potential variations in state criminal procedure include detention and release, interrogations, and wiretapping.

⁷¹ *See, e.g.*, Saylor, *supra* note 64, at 285 (“The residual quality of state power, and the associated concept of local control, have yielded the metaphor of states as laboratories, free to experiment with novel social and political ideas and thereby create diversity.”).

⁷² It also may not be true. The Court of Appeals for the Ninth Circuit, for example, has suggested that the simple answer is for federal courts to adopt the state court’s exclusionary rule, as a matter of comity:

We believe that it would undercut the deterrent function of a state’s exclusionary rule if state officers were able to turn illegally seized evidence over to federal authorities whenever they suspected the subject of the investigation of an offense susceptible to federal, as well as state, prosecution. We think there is much to be said for the argument that federal courts should, in the interest of comity, defer to a state’s more stringent exclusionary rule with respect to evidence secured without federal involvement.

United States v. Henderson, 721 F.2d 662, 665 (9th Cir. 1983).

terms. Professor Diehm, for example, complains that law enforcement officers can "evade constitutional strictures" by taking a case to another court.⁷³ But, given that the Federal Constitution provides minimum protections, the constitutional strictures that the officers will be evading are *state* constitutional strictures. In other words, eliminating independent state constitutional analysis only serves to force everyone to the lowest common denominator, federal law, where Diehm and other critics seem to want everyone to go anyway.

As for the argument that fragmentation of criminal procedure law is hard on law enforcement, that may or may not be the case. I have seen no empirical support for the assertion. Critics seem quick to assume that law enforcement officials are not capable of understanding differences in state and federal constitutional procedure. I do not know why. Those same officials are apparently capable of understanding differences in state and federal statutory criminal procedure. Likewise, they are apparently capable of understanding a host of differences between state and federal, to say nothing of municipal, *substantive* criminal law.

Aside from that, it simply does not follow that, merely because different standards may be developed by state and federal courts, state law enforcement officials are required to apply both of them. In all cases, those officials are required to apply only one, namely the one most protective of individual rights.⁷⁴ Moreover, the argument that requiring law enforcement officials to apply only federal law is easier assumes that it is, in fact, easier to apply federal law. As I have noted, that is not an assumption that is obviously correct.⁷⁵

That leaves the contention that independent interpretation of state search and seizure provisions produces more litigation. The argument seems to rest on the assumption that a decision

⁷³ Diehm, *supra* note 45, at 257.

⁷⁴ See FRIESEN, *supra* note 39, §§ 13-17 (writing that officials are required to apply only a single standard, namely, the more protective standard).

⁷⁵ TARR, *supra* note 13, at 181 n.32 ("[S]tate courts' adoption of the federal standard produces clarity only if the federal law is by definition clearer than the possible state standards. Yet there is little reason to believe that in theory or to expect it in practice . . .").

from the United States Supreme Court that resolved an issue for all states would obviate the need for each individual state to address a matter. Even taking the argument on its own terms, however, I wonder if it really makes sense. The United States Supreme Court actually takes very few cases each term, and only a few of them are search and seizure cases.⁷⁶ In the meantime, the states are left to litigate matters on their own, with a host of lower federal court decisions, often themselves conflicting, to guide them. It seems to me at least as likely that state constitutionalism would have the opposite effect. Given the independent state grounds doctrine of *Michigan v. Long*, state constitutionalism would reduce the need for federal court intervention to the extent that a judicial decision rests entirely on state constitutional grounds.⁷⁷ Let us pause to recap the bidding so far. I have talked about whether, in the abstract, states should interpret their state search and seizure provisions independently of case law construing the Fourth Amendment. I have suggested that the more appropriate question is not whether state search and seizure law *should* depart from Federal Fourth Amendment law, but instead whether state search and seizure law *does* depart from federal law. In my view, the question is simply one of state constitutional interpretation.

I have addressed what I understand to be the arguments against state constitutional interpretation in general and against independent interpretation of state constitutional search and seizure provisions in particular. I have explained why I have found those arguments unpersuasive.

II. THE QUESTION IN CONCRETE TERMS: HOW HAS OREGON RESPONDED?

What I would like to do in the balance of this article is to provide an overview of the search and seizure law in my own state to illustrate how some of the very issues and arguments that I have just described have played out in the real-world development of a

⁷⁶ In the 2005-06 term, for example, of the Court's eighty-three reported decisions, a total of four were search and seizure cases; three state cases and one federal case. *The Supreme Court, 2005 Term: The Statistics*, 120 HARV. L. REV. 372, 384 (2006).

⁷⁷ See *supra* notes 36-41 and accompanying text.

state's independent constitutional law. Space does not permit an exhaustive analysis of the development of Oregon search and seizure law.⁷⁸ What I propose to do is provide a brief summary with a focus on the gradual acceptance of the independence, and ultimately the *primacy*, of state search and seizure law and then explore how that acceptance affected the development of search and seizure doctrine in a few example cases.

A. The Oregon Constitutional Revolution

Article I, Section 9, of the Oregon Constitution provides that “[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”⁷⁹ The text of the provision, adopted in 1857, is nearly, but not completely identical to the text of the Fourth Amendment.

From early on, the scope of Article I, Section 9, nearly always was regarded as identical to the scope of the Fourth Amendment. In an early example, the 1922 decision of *State v. Laundy*, the defendant relied on Article I, Section 9 and the Fourth Amendment.⁸⁰ The Oregon Supreme Court responded that Article I, Section 9, “although not in the identical language, is in effect and meaning the same” thing as the Fourth Amendment.⁸¹ Still, on occasion, the Court gave independent effect to Article I, Section 9, even in those early years. For example, as early as the 1920s, the Oregon Supreme Court recognized the search-incident-to-arrest doctrine, years before the United States Supreme Court recognized it.⁸²

⁷⁸ For a more complete description of Oregon search and seizure law see generally PAUL J. DEMUNIZ, A PRACTICAL GUIDE TO OREGON CRIMINAL LAW & PRACTICE (2005).

⁷⁹ OR. CONST. art I, § 9.

⁸⁰ 204 P. 958, 974 (Or. 1922).

⁸¹ *Id.*

⁸² The matter was first mentioned in *State v. McDaniel*, a case in which, during the arrest of the defendant for murder, the police seized from him a letter. 65 P. 520, 523 (Or. 1901). The defendant objected that the seizure of the letter violated both federal and state guarantees against unreasonable searches and seizures. *Id.* The court concluded that there was a valid search and seizure, commenting that there can be no objection “to the introduction of the letter in question because it was found upon the per-

The 1970s represent something of a transition period in the history of Oregon search and seizure law. The Supreme Court more frequently began to acknowledge expressly the *possibility* that it *could* interpret Article I, Section 9, differently from cases construing the Fourth Amendment, while at the same time choosing to follow the lead of the federal courts construing the Federal Constitution. The best example of this is the 1974 case *State v. Florance*.⁸³ This case is worth talking about for a number of reasons, among others that it illustrates the concern that I mentioned earlier about the problems that occur when a state that follows federal law has to deal with subsequent changes in that federal law.

The Oregon courts had decided earlier to follow United States Supreme Court precedent in defining a lawful search incident to arrest to require that the search be reasonably related to the offense that prompted the arrest.⁸⁴ In 1973, however, the United States Supreme Court decided, in *United States v. Robinson*, that those limitations do not need to apply; that is to say, the Court adopted a new approach to searches incident to arrest, an approach that entailed a less generous view of individual rights.⁸⁵ In the 1974 *Florance* case, the Oregon Supreme Court

son of the defendant at the time of his arrest." *Id.* The doctrine was adopted more explicitly in *Laundy*, 204 P. at 976 ("Stated broadly, the general rule is that the arresting officer may at the time of making the arrest lawfully take articles in the possession or under the control of the prisoner, if they supply evidence of guilt.") (citing *Azparren v. Ferrel*, 191 P. 571 (Nev. 1920)). The United States Supreme Court recognized the doctrine in *Agnello v. United States*, 269 U.S. 20, 30 (1925).

⁸³ 527 P.2d 1202 (Or. 1974), *overruled by* *State v. Caraher*, 653 P.2d 942 (1982). Other examples include *State v. Holt*, 630 P.2d 854 (Or. 1981), *State v. Bishop*, 605 P.2d 642 (Or. 1980), *State v. Nettles*, 597 P.2d 1243 (Or. 1979), and *State v. Heintz*, 594 P.2d 385 (Or. 1979).

⁸⁴ See, e.g., *State v. Cloman*, 456 P.2d 67, 73 (Or. 1969); *State v. Krogness*, 388 P.2d 120, 124 (Or. 1963), *cert. denied*, 377 U.S. 992 (1964); *State v. Chinn*, 373 P.2d 392, 396 (Or. 1962).

⁸⁵ 414 U.S. 218 (1973). The *Robinson* Court explained that

[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect

had to decide whether to stick with the earlier Fourth Amendment decisions or go along with *Robinson*. The Oregon court expressly stated that “[i]f we choose we can continue to apply [the pre-*Robinson*] interpretation. We can do so by interpreting article I, § 9, of the Oregon [Constitution] . . . as being more restrictive” than the Fourth Amendment.⁸⁶ The Oregon court, however, decided not to do that.⁸⁷ The court explained that

[t]here are good reasons why state courts should follow the decisions of the Supreme Court of the United States on questions affecting the Constitution of the United States . . . as well as under identical or almost identical provisions of state constitutions, as in this case. *The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges . . .* Federal and state law officers frequently work together and in many instances do not know whether their efforts will result in a federal or state prosecution or both. In these instances two different rules would cause confusion.⁸⁸

The Oregon court then overruled its own prior cases following the pre-*Robinson* federal cases and explicitly adopted *Robinson* as Oregon law.⁸⁹

Interestingly, there was a vigorous dissent from Justice, and former University of Oregon Law School dean, K.J. O’Connell.⁹⁰ Among other things, Justice O’Connell complained that “[w]hether any substantial amount of confusion arises out of [declining to track the change in federal law], I am not prepared to say because I have no information on the subject and I suspect

based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a “reasonable” search under that Amendment.

Id. at 235 (emphasis added).

⁸⁶ *State v. Florance*, 527 P.2d 1202, 1208 (Or. 1974), *overruled by State v. Caraher*, 653 P.2d 942 (1982).

⁸⁷ *Id.* at 1208-09.

⁸⁸ *Id.* at 1209 (emphasis added) (citations omitted).

⁸⁹ *Id.* at 1209-10.

⁹⁰ *Id.* at 1213-16 (O’Connell, C.J., dissenting).

that the majority is in no better position than I to make an appraisal of the situation."⁹¹ O'Connell complained that, "[a]s a logical matter, it is hard to conceive of how the presence of a stricter Oregon view would be confusing. Since evidence seized in violation of our constitution [sic] would be inadmissible in our state courts, Oregon police need recognize only the stricter Oregon rule."⁹² It should be noted, the dissenting Justice added, "that the federal and state rules governing police conduct have always differed in significant ways."⁹³

Justice O'Connell was to be vindicated a short eight years later in *State v. Caraher*.⁹⁴ *Caraher* involved a warrantless search of the defendant's purse, including opening a coin compartment of the wallet within the purse, after an arrest for possession of a controlled substance.⁹⁵ When the defendant moved to suppress the evidence, the state argued that the case was controlled by *Robinson* and *Florance*.⁹⁶ The trial court and the court of appeals agreed.⁹⁷

The Oregon Supreme Court, however, decided that this was the time to declare independence from Federal Fourth Amendment cases. Its earlier decision in *Florance*, the court explained, "does not make article I, section 19, . . . the same as the federal fourth amendment for all times and purposes."⁹⁸ The court noted the concern expressed in *Florance* for uniformity in criminal procedure. "Eight years of uniformity with United States Supreme Court decisions," the court observed, "has not . . . brought simplification to the law of search and seizure in this state."⁹⁹ The court then decided to take a different path:

[W]e remain free, even after *Florance*, to interpret our own constitutional provision regarding search and seizure and to impose higher standards on searches and seizures under our own constitution than are required by the federal constitution. This is

⁹¹ *Id.* at 1214.

⁹² *Id.* at 1214 n.1.

⁹³ *Id.*

⁹⁴ 653 P.2d 942 (Or. 1982).

⁹⁵ *Id.* at 943.

⁹⁶ *Id.* at 947.

⁹⁷ *See id.* at 943-44 nn.5-6.

⁹⁸ *Id.* at 946.

⁹⁹ *Id.*

part of a state court's duty of independent constitutional analysis. That a state is free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional standards is beyond question. Indeed, the states are "independently responsible for safeguarding the rights of their citizens."¹⁰⁰

The court explained that "[t]his is not a revolutionary idea but one that is founded in the most fundamental principles of federalism and in the history of state constitutions."¹⁰¹

Interestingly, the court still affirmed the denial of the motion to suppress the evidence. The court concluded that *Florance* was wrong in dispensing with the requirement that a lawful search incident to arrest requires that the search be necessary to preserve evidence of the crime for which the defendant was being arrested.¹⁰² Nevertheless, it concluded that, in *Cara her*, the search *was* necessary to preserve evidence of the crime of arrest, that is, possession of a controlled substance.¹⁰³

A lone judge dissented from the rejection of *Florance* and the majority's "depart[ure] on a lonely journey in the dark of the moon and against the wind into the quagmire of the law of search and seizure" without guidance from the federal courts.¹⁰⁴

But that was the last voice of dissent in the Oregon constitutional revolution. Since then, the Oregon courts have never looked back. In the years since *Cara her*, the courts have never questioned the independent significance of the Oregon constitutional search and seizure provision. In fact, the Oregon courts went one step further. In its 1983 decision in *State v. Kennedy*,¹⁰⁵ the Oregon Supreme Court decided that the state constitution is not merely independent, but *primary*. That is to say, the state constitution must be examined first, and the Federal Constitution will be examined only if the state counterpart does not afford

¹⁰⁰ *Id.* at 947 (quoting *People v. Brisendine*, 531 P.2d 1099 (1975) (citation omitted)).

¹⁰¹ *Id.* at 950 n.13.

¹⁰² *Id.* at 952.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (Campbell, J., concurring).

¹⁰⁵ 666 P.2d 1316 (Or. 1983).

complete relief.¹⁰⁶ This “first-things-first” doctrine, the court explained, applied regardless of whether the parties even raised a state constitutional argument.¹⁰⁷ In *Kennedy*, in fact, the parties had barely mentioned the state constitution. The court nevertheless addressed the state constitution before reaching the federal counterpart, explaining that “an Oregon court should not readily let parties, simply by their choice of issues, force the court into a position to decide that the state’s government has fallen below a nationwide constitutional standard when in fact the state’s law, when properly invoked, meets or exceeds that standard.”¹⁰⁸

Whether the Oregon courts have remained consistently committed to the first-things-first doctrine can be debated. (I have complained, for example, that the supreme court in recent years seems to be retreating from it in favor of a more prudential practice of addressing state constitutional issues only when raised and briefed.¹⁰⁹) But the court has never exhibited second thoughts about the independence of Article I, Section 9. In the years since *Caraher*, the Oregon courts have developed their own body of case law, consisting of over 700 published opinions, concerning the law of search and seizure under the state constitution.

*B. Example: What is a “Search” Subject to
Constitutional Protection?*

Obviously, I cannot review all 700 opinions. Instead, let me offer a very quick overview of the law concerning one particular issue, to provide at least a flavor of how Oregon search and seizure law has developed independently of Fourth Amendment doctrine.

Let us talk about the very basic question of what constitutes a “search” that is subject to constitutional protection. Fourth Amendment analysis requires an examination of “reasonable ex-

¹⁰⁶ *Id.* at 1320-21.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1320.

¹⁰⁹ Jack L. Landau, *Of Lessons Learned and Lessons Nearly Lost: The Linde Legacy and Oregon Constitutional Law*, 43 WILLAMETTE L. REV. 251, 260-61 (2007).

pectations of privacy.”¹¹⁰ Oregon courts have rejected that test. In *State v. Tanner*,¹¹¹ the Oregon Supreme Court explained that, “[o]ne difficulty with analyzing privacy interests in terms of ‘expectations’ is that the issue is one of *right*, not expectation.”¹¹² The court observed that, if expectations were determinative of privacy rights, the government could diminish those expectations simply by announcing over a period of time that, in the future, all citizens would be subject to electronic surveillance.¹¹³ And, in *State v. Campbell*,¹¹⁴ the court explicitly rejected the test outright. According to the court, the reasonable expectation of privacy test is “a formula for expressing a conclusion rather than a starting point for analysis, masking the various substantive considerations that are the real basis on which Fourth Amendment searches are defined.”¹¹⁵ Either a person has a right to privacy or does not, the court explained.¹¹⁶

¹¹⁰ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (describing prior case law to define a “search” under the Fourth Amendment in terms of a “subjective expectation of privacy” that society is willing to recognize as “reasonable”); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (a “search” within the meaning of the Fourth Amendment occurs “when an expectation of privacy that society is prepared to consider reasonable is infringed”). The “reasonable expectation of privacy” test is usually traced back to Justice Harlan’s concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹¹¹ 745 P.2d 757 (Or. 1987).

¹¹² *Id.* at 762 n.7 (emphasis added).

¹¹³ *Id.*

¹¹⁴ 759 P.2d 1040 (Or. 1988).

¹¹⁵ *Id.* at 1044.

¹¹⁶ *Id.* In a footnote, the court addressed the broader issue of the effect of United States Supreme Court decisions to the contrary:

[T]here is no presumption that interpretations of the Fourth Amendment by the Supreme Court of the United States are correct interpretations of Article I, section 9 [of the Oregon Constitution]. Article I, section 9, and the Fourth Amendment have a common source in the early state constitutions, but they have textual and substantive differences. Even were the provisions identical, this court would nonetheless be responsible for interpreting the state provision independently, though not necessarily differently. Majority opinions of the Supreme Court of the United States may be persuasive, but so may concurring and dissenting opinions of that court, opinions of other courts construing similar constitutional provisions, or opinions of legal commentators. What is persuasive is the reasoning, not the fact that the opinion reaches a particular result.

Id. at 1044 n.7 (citations omitted). The Oregon Supreme Court has not yet explained the source of the difference between state and federal search analysis. Judge David Schuman has suggested the distinction is a result of the underlying differences between the liberal-

The rejection of the reasonable expectation of privacy test has led to some interesting differences between Oregon and federal law about what constitutes a “search” that is subject to state or federal constitutional protection.

For example, in *United States v. Knotts*,¹¹⁷ the United States Supreme Court held that police insertion of a radio transmitter in a drum is not a search within the meaning of the Fourth Amendment. In contrast, in *Campbell*, the Oregon Supreme Court concluded that placing a radio transmitter on a car is a search within the meaning of Article I, Section 9.¹¹⁸

To take another example, in *California v. Greenwood*,¹¹⁹ the United States Supreme Court held that a defendant has no reasonable expectation of privacy in garbage bags left at the curbside. Two years ago, in *State v. Galloway*,¹²⁰ the Oregon Court of Appeals concluded that defendants *do* retain a possessory interest in the contents of their garbage cans while the cans sit at the curbside awaiting collection. In an interesting footnote to that decision, more recently, in *State v. Howard*,¹²¹ the court of appeals concluded that, although a defendant may retain a possessory interest in garbage placed in collection cans, once the garbage has actually been collected, the defendant loses any interest in it. “It was, after all, garbage,” the court explained.¹²² The supreme court later affirmed, likening the garbage to abandoned property, in which no person has a protected privacy interest.¹²³

To take a final example, in *Oliver v. United States*,¹²⁴ the United States Supreme Court held that the Fourth Amendment does not apply to “open fields” beyond the curtilage of a home. In *State v. Dixon*,¹²⁵ however, the Oregon Supreme Court concluded

individualist political theory that characterizes federal individual rights cases and the civic-republican, or “communitarian,” political theory that is implicit in Oregon individual rights jurisprudence. See generally David Schuman, *Taking Law Seriously: Communitarian Search and Seizure*, 27 AM. CRIM. L. REV. 583 (1990).

¹¹⁷ 460 U.S. 276 (1983).

¹¹⁸ 759 P.2d at 1049.

¹¹⁹ 486 U.S. 35 (1988).

¹²⁰ 109 P.3d 383 (Or. App. 2005).

¹²¹ 129 P.3d 792 (Or. App. 2006).

¹²² *Id.* at 798.

¹²³ *State v. Howard*, 157 P.3d 1189 (Or. 2007).

¹²⁴ 466 U.S. 170 (1984).

¹²⁵ 766 P.2d 1015 (Or. 1988).

that Article I, Section 9, protects the privacy of an individual from government scrutiny on land outside of the curtilage of the individual's dwelling. The court explained that the individual's privacy interest does not "go unprotected simply because of [the land's] location."¹²⁶

I recognize that it can be debated whether these differences in results can actually be justified by principled differences in the wording or intended meanings of the state and federal constitutions. For example, I wonder whether it really makes a difference to rely on the "reasonable expectation of privacy" formulation of Fourth Amendment cases or the "privacy to which you have a right" formulation of the state cases. It strikes me that, notwithstanding what the Oregon Supreme Court said about the federal standard in *State v. Tanner*, the state standard is not much less conclusory than its federal counterpart.¹²⁷

But, as I have said, I regard such criticisms as rather beside the point when the question is *whether* state constitutions have independent significance, apart from their parallels in the Fed-

¹²⁶ *Id.* at 1022.

¹²⁷ For example, in *Campbell*, in which the Oregon Supreme Court held that the placement of a radio transmitter on a private individual's vehicle is a search within the meaning of Article I, Section 9, of the Oregon Constitution, the court eschewed any reliance on a "reasonable expectation of privacy" test. *See supra* notes 114-16 and accompanying text. At the same time, however, it concluded that, although social and legal norms of behavior are not determinative, they are nevertheless relevant to determining the existence of a right to privacy under Article I, Section 9. *State v. Campbell*, 759 P.2d 1044, 1048 (Or. 1988). In the end, the court simply concluded that allowing the state to place a radio transmitter on a car would represent a "staggering limitation upon personal freedom." *Id.* at 1049.

It strikes me that the difference between defining a search by reference to what society deems "reasonable" and by reference to "social and legal norms of behavior" is not easy to articulate. And the principle by which the court arrived at the conclusion that placing a radio transmitter on a car amounts to a search is not obvious. In that regard, it may be useful to observe that, more recently, in *State v. Meredith*, 96 P.3d 342 (Or. 2004), the Oregon Supreme Court held that placing a radio transmitter on a car supplied by an individual's employer did *not* amount to a search under Article I, Section 9. The court's explanation as to why the case was not controlled by *Campbell* was brief. According to the court in *Meredith*, the use of a transmitter in that case "occurred in a factually unique context and employment relationship." *Id.* at 346. According to the court, the defendant did not have a privacy right in the location of his employer's vehicle. *Id.* I do not quarrel here with the result in either case, but it does strike me that the explanations in both are hardly less conclusory than any of the federal cases that are decided under the "reasonable expectation of privacy" analysis required under the Fourth Amendment.

eral Constitution. It seems to me, as I hope this paper has made clear, that they do. Certainly, state courts have work to do in better justifying their decisions. But the fact that such work remains to be done cannot detract from the soundness of the conclusion that it is work worth doing.

FOURTH AMENDMENT AND INDEPENDENT STATE GROUNDS*

*Irma S. Raker***

State court interpretations of state constitutional provisions that are the same as or similar to the United States Constitution have received much attention in recent years.¹ State courts have taken different approaches, with some courts applying the federal interpretation of the United States Constitution to the state constitution on the grounds that the language of the two constitutions are the same or substantially similar and therefore should be construed in a similar manner.² Other courts have diverged from the federal interpretation and, recognizing that states may provide greater individual protection to a defendant, not less, have looked to the state constitution as an independent source of individual rights.³ This article will address which approach might apply in search and seizure cases, as well as a defendant's right to have evidence obtained from an illegal search or seizure, excluded under the Fourth Amendment and Article 26 of the Maryland Declaration of Rights.

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment,

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¹ See, e.g., Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41 (2006).

² See, e.g., *State v. Gallup*, 512 S.E.2d 66, 69 (Ga. Ct. App. 1999); *Colbert v. Commonwealth*, 43 S.W.3d 777, 780 (Ky. 2001); *State v. Deck*, 994 S.W.2d 527, 534 (Mo. 1999); *State v. Vermuele*, 453 N.W.2d 441, 446 (Neb. 1990).

³ Michael J. Gorman, *Survey: State Search And Seizure Analogs*, 77 MISS. L.J. 417 (2007).

protects against unreasonable searches and seizures.⁴ The Fourth Amendment states as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵

Article 26 of the Maryland Declaration of Rights is the Maryland analog to the Fourth Amendment.⁶ Article 26 provides as follows:

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.⁷

Article 26 of the Maryland Declaration of Rights was adopted originally in 1776 as Article 23 of Maryland's first Declaration of Rights, preceding the Fourth Amendment to the United States Constitution by fifteen years. Article 23 responded to the British colonial government's use of general warrants and writs of assistance, which were search authorizations permitting wide-ranging and open-ended searches for evidence of political crimes.⁸ Since its adoption, Article 26 has remained virtually unaltered, except for minor style changes and the renumbering from Article 23, through several subsequent constitutional conventions, held in 1851, 1864, and 1867.⁹

⁴ U.S. CONST. amend. IV.

⁵ *Id.*

⁶ MD. CONST. art. 26.

⁷ *Id.*

⁸ *Lambert v. State*, 75 A.2d 327, 329 (Md. 1950).

⁹ In 1967-68, as part of a sweeping revision of the Maryland Constitution and Declaration of Rights, drafters proposed a revision of Article 26 echoing the language of the Federal Constitution, with an added provision covering electronic eavesdropping. The proposed language read as follows:

With respect to Article 26, Maryland has not resolved Fourth Amendment issues on independent state grounds and continues to interpret Article 26 *in pari materia* with the United States Supreme Court's interpretation of the Fourth Amendment. In the last few years, the Maryland Court of Appeals has been called upon to decide search and seizure issues solely on Article 26, to interpret Article 26 on independent state grounds and to reject the reasoning of the United States Supreme Court's interpretation of the Fourth Amendment.¹⁰ The court has declined to do so,¹¹ noting, however, that although the court interprets the two constitutional provisions *in pari materia* and the United States Supreme Court interpretation is persuasive, each constitutional provision is independent and a violation of one is not necessarily a violation of the other.¹²

Historically, statements in Maryland cases that Article 26 is *in pari materia* with the Fourth Amendment, date from as early as 1902. In *Blum v. State*,¹³ the court stated that "the fourth and fifth amendments . . . are in pari materia with arti-

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and in their oral or other communications against unreasonable interceptions shall not be violated. No search warrant shall be issued except upon probable cause supported by oath or affirmation, and the place to be searched, the persons or things to be seized, or the communications sought to be intercepted shall be particularly described in the warrant.

MARYLAND CONSTITUTIONAL CONVENTION COMMISSION, REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION TO HIS EXCELLENCY, SPIRO T. AGNEW, GOVERNOR OF MARYLAND, THE HONORABLE ASSEMBLY OF MARYLAND, THE DELEGATES TO THE CONSTITUTIONAL CONVENTION OF MARYLAND AND TO THE PEOPLE OF MARYLAND 107 (King Brothers, Inc. 1967). Maryland voters rejected the revised constitution. See also Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 940 (2002) (presenting a useful tabular display of the various versions of the Maryland Declaration of Rights, from the first draft to the current version).

¹⁰ *Parker v. State*, No. 37 (Md. argued Nov. 3, 2006) (presently pending in the Court of Appeals); *Fitzgerald v. State*, 864 A.2d 1006, 1007 (Md. 2004); *Richardson v. McGriff*, 762 A.2d 48, 52 (Md. 2000).

¹¹ But see *Fitzgerald*, 864 A.2d at 1020 (assuming arguendo that Maryland had an exclusionary rule, the evidence would not be suppressed because a dog sniff at an apartment door was not an illegal search under either the Fourth Amendment or Article 26).

¹² *Gahan v. State*, 430 A.2d 49, 55 (Md. 1981).

¹³ 51 A. 26 (Md. 1902).

cles 26 and 22.”¹⁴ During this early period, the United States Supreme Court had not yet mandated that the core rights under the Fourth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment,¹⁵ and parallels between the federal and state provision, while sometimes viewed as persuasive, were not binding on the states.¹⁶

The Maryland Court of Appeals has stated repeatedly that Article 26 is “very similar in its verbiage to the 4th Amendment to the Federal Constitution”¹⁷ and in regard to its construction, stated as follows:

[T]he decisions of the United States (Supreme) Court, in reference to the corresponding provisions of the Federal Constitution, are adopted by our court as authority which is very persuasive, although not necessarily controlling. The Federal constitutional law, therefore, construing these articles of the Federal Constitution is pertinent upon the construction of articles of this class in our State Declaration of Rights.¹⁸

Chief Judge Brune, writing for the court, stated in *Givner v. State*¹⁹ that Article 26 is *in pari materia* with the Fourth Amendment, and that although Article 26 is older than the Fourth Amendment by some years, both grew out of the same historical background.²⁰ Chief Judge Brune stated as follows:

Our Article 26 does not, as does the Fourth Amendment, . . . contain an express declaration of the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. However, Art. 26 has been construed as a limitation upon the power of the Legislature to pass any law, or of the courts to issue any process, which would violate that Article.²¹

¹⁴ *Id.* at 29.

¹⁵ *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁶ *See Gahan*, 430 A.2d at 54.

¹⁷ *Id.* at 54 (quoting ALFRED S. NILES, MARYLAND CONSTITUTIONAL LAW 50 (1915)).

¹⁸ *Id.* (quoting NILES, *supra* note 19, at 13).

¹⁹ 124 A.2d 764 (Md. 1956).

²⁰ *Id.* at 768; *see also* Friedman, *supra* note 9, at 937.

²¹ *Givner*, 124 A.2d at 768 (citation omitted).

Like the search and seizure provision in the Virginia Constitution upon which it was modeled,²² the plain language of Article 26 did not address warrantless or unreasonable searches. It seems clear, at least today, that even though the language of the Fourth Amendment and that of Article 26 are not exactly the same, the Maryland Court of Appeals has found it sufficiently similar to the Fourth Amendment to view the provision as a protection against all unreasonable searches and seizures.²³ In fact, in *Liichow v. State*,²⁴ the court stated that "Article 26 is generally *in pari materia* with the Fourth Amendment and similarly prohibits unreasonable search and seizures."²⁵

The notion that Article 26 and the Fourth Amendment are *in pari materia* has continued to this day. Although thus far Article 26 has been construed in lockstep with the Fourth Amendment, historically and today, the door has been left open for the court to rely on Article 26 and to deviate from the United States Supreme Court's Fourth Amendment interpretation. The first hint of such an approach comes from *Liichow*, written for the court by Judge John C. Eldridge, in 1980. The defendant was convicted of multiple counts of possession of controlled dangerous substances.²⁶ The police seized the drugs contained in a plastic bag, without a warrant, while Liichow was moving his possessions from a rented dwelling.²⁷ The issue on appeal was

²² *Id.*

²³ *Miller v. State*, 198 A. 710, 716 (Md. 1938). The court in *Miller* stated as follows:

Article 26 of the Maryland Bill of Rights provides: "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted." If a general search warrant is condemned, how much more obnoxious must be an authorization to conduct a general and indiscriminate search of persons and property without any warrant. *Cornelius on Search and Seizure*, §§ 3, 4, 5; *Cooley on Const. Lim.* 610 et seq.

Id.; but see Thomas K. Clancy, *A Vision of Search and Seizure Protection*, 34 Md. B. J. 11, 12 (Jan./Feb. 2001) (stating that Article 26 addresses abuses associated with warrants, and does not contain a broad "statement of the right to be secure from all forms of unreasonable searches and seizures").

²⁴ 419 A.2d 1041 (Md. 1980).

²⁵ *Id.* at 1044 n.1.

²⁶ *Id.* at 1042.

²⁷ *Id.*

whether the warrantless search and seizure of the plastic bag violated petitioner's constitutional rights to be free from unreasonable search and seizure.²⁸ The court had an interesting footnote, explaining the court's choice to reach the issue on both federal and state constitutional grounds. The court stated as follows:

The [certiorari] question presented did not limit the scope of the search and seizure issues to the Fourth Amendment to the United States Constitution. Therefore we shall treat the contentions as being grounded on both the Fourth Amendment and Article 26 of the Maryland Declaration of Rights. Although the wording of Article 26 is somewhat different than that of the Fourth Amendment, this Court has taken the position that Article 26 is generally *in pari materia* with the Fourth Amendment and similarly prohibits unreasonable search and seizures.²⁹

The court held, in a four to three opinion, that Liichow had a constitutionally protected expectation of privacy in the plastic bag and "[t]he search violated the Fourth Amendment *and Art. 26 of the Maryland Declaration of Rights, and the evidence obtained should have been suppressed.*"³⁰

The next year, in 1981, in *Gahan v. State*,³¹ the court addressed the United States Supreme Court's rejection of automatic standing of a defendant charged with criminal possession of certain property and his right to contest the search and seizure of that property. The court, on its own initiative, directed that "[the argument] should include the question of the applicability of Art. 26 of the Maryland Declaration of Rights."³² Discussing the *in pari materia* notion, and again recognizing the very persuasive, although not controlling authority of the decisions of the United States Supreme Court as to the interpretation of the Fourth Amendment, the court reiterated that "each provision is independent, and a violation of one is not necessar-

²⁸ See *id.* at 1044.

²⁹ *Id.* at 1044 n.1.

³⁰ *Id.* at 1048 (emphasis added).

³¹ 430 A.2d 49 (Md. 1981).

³² *Id.* at 50 (internal quotation marks omitted).

ily a violation of the other.”³³ Reasoning that the United States Supreme Court holdings in *Rawlings v. Kentucky*³⁴ and *United States v. Salvucci*³⁵ are very similar to prior statements of the Maryland Court of Appeals regarding Article 26, the Maryland court rejected automatic standing and instead followed the United States Supreme Court’s interpretation.³⁶ The court held that a defendant challenging the validity of a search and seizure must establish that his or her own rights have in fact been violated.³⁷ Judge Rita Davidson dissented. She would have decided the case on independent state grounds based upon Article 26.³⁸ Agreeing with the majority that Article 26 is *in pari materia* with the Fourth Amendment, and that decisions of the United States Supreme Court on the Fourth Amendment are entitled to great respect, Judge Davidson stressed that they are only persuasive when interpreting the Maryland Declaration of Rights.³⁹

Significantly, in addition to the historical court approach consistently interpreting Article 26 and the Fourth Amendment *in pari materia*, to date Maryland has not recognized an exclusionary rule that would preclude the admission of evidence seized in violation of Article 26.⁴⁰ And so, in order to proceed on independent state grounds and diverge from the United States Supreme Court interpretation of the Fourth Amendment, the court would have to recognize an exclusionary rule.

³³ *Id.* at 55.

³⁴ 448 U.S. 98 (1980).

³⁵ 448 U.S. 83 (1980).

³⁶ *Gahan*, 430 A.2d at 55.

³⁷ *Id.*

³⁸ *Id.* at 60 (Davidson, J., dissenting).

³⁹ *Id.*

⁴⁰ See *Brown v. State*, 916 A.2d 245, 251 (Md. 2007) (“Although the alleged conduct may also violate the Maryland Declaration of Rights, because there is no general exclusionary provision in Maryland for such violations, the conduct must violate the federal Constitution to be excluded.”) (citing *Fitzgerald v. State*, 864 A.2d 1006, 1019 (Md. 2004) (citing *Chu v. Anne Arundel County*, 537 A.2d 250 (Md. 1988))); *Anne Arundel County v. Chu*, 518 A.2d 733, 738 (Md. Ct. Spec. App. 1987) (Moylan, J.) (“Maryland, for that matter, has no Exclusionary Rule of its own to this very day.”). See also Stephen E. Henderson, *Learning From All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 410 n.157 (2005) (noting that Maryland state analog’s lack of exclusionary remedy “presumably discourages litigants from raising it as an alternative ground” to Fourth Amendment).

Oddly enough, it was not always the case that there was no exclusionary rule in Maryland for illegally seized evidence. Turning to the historical perspective of an exclusionary rule in search and seizure cases in Maryland, "*a funny thing happened on the way to the forum*," so far as an exclusionary rule goes.

The legality of the search and seizure of evidence did not affect the admissibility of evidence in Maryland, at least until 1929. In *Lawrence v. State*,⁴¹ the Maryland Court of Appeals reasoned that:

[T]hough papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice of how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.⁴²

In other words, the admissibility of evidence is not affected by the illegality of the means through which the evidence was obtained.

In *Weeks v. United States*,⁴³ the United States Supreme Court held that, subject to some restrictions and qualifications, evidence illegally obtained by federal agents is inadmissible in a federal prosecution and that the Fourth Amendment incorporated an exclusionary rule.⁴⁴ The Court did not hold that the Fourth Amendment was applicable to state proceedings. Nonetheless, many state courts after *Weeks* held that state constitutional provisions similar to the Fourth Amendment also incorporated exclusionary rules.⁴⁵

⁴¹ 63 A. 96 (Md. 1906).

⁴² *Id.* at 103 (quoting 1 GREENLEAF ON EVIDENCE § 254 (a)).

⁴³ 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

⁴⁴ *Id.* at 398.

⁴⁵ See generally Gorman, *supra* note 3; Fitzgerald v. State, 864 A.2d 1006, 1020 (Md. 2004) (noting that forty-six states have an exclusionary rule for their state constitutions).

The Maryland Court of Appeals rejected the federal rule in *Meisinger v. State*.⁴⁶ *Meisinger* was an important case because it triggered legislative reform. Meisinger was indicted for the misdemeanor offense of having in his possession intoxicating, spiritous or fermented liquors, with the intent to unlawfully sell the same.⁴⁷ Pursuant to a search warrant, the defendant's premises were "invaded" by the sheriff, who searched and seized intoxicating liquor, utensils and materials used in its making.⁴⁸ The court found that the search was illegal because the warrant should not have been issued and the sheriff was therefore a trespasser.⁴⁹ The primary question in the case was the admissibility of the evidence secured under an illegal search warrant. The court was urged to adopt and apply the *Weeks* exclusionary rule to Maryland law enforcement officers, but, in a four to three decision, declined to do so.⁵⁰ Based on *Lawrence* and the doctrine of stare decisis, the court held that the evidence was admissible.⁵¹

At the next general session of the Maryland General Assembly, in direct response and in disagreement with the underlying policy expressed by the court in *Meisinger*, the Legislature passed Chapter 194 of the Acts of 1929, known as the Bouse Act.⁵² The Legislature adopted an exclusionary rule for certain misdemeanors, but not felonies. The statute read, in pertinent part, as follows:

No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through,

⁴⁶ 141 A. 536, 538 (Md. 1928), *superseded by statute*, Bouse Act, MD. ANN. CODE art. 25, § 5 (Supp. 1935), *as recognized in* *Chu v. Anne Arundel County*, 537 A.2d 250 (Md. 1988).

⁴⁷ *Id.* at 536.

⁴⁸ *Id.*

⁴⁹ *Id.* at 538.

⁵⁰ *Id.* at 537. Judge Parke, writing for three members of the court in dissent, would have adopted the federal rule of exclusion in Maryland as a matter of Maryland constitutional law, noting that "[t]he doctrine advocated in this dissent would bring the state and federal rule in harmony and make the rights of the citizen no less secure under the state than the federal Constitution." *Meisinger v. State*, 142 A. 190, 194 (Md. 1928) (Parke, J., dissenting). The majority and dissenting opinions are in two separate volumes of the *Atlantic Reporter*.

⁵¹ *Meisinger*, 141 A.2d at 538.

⁵² 1929 Md. Laws 534 (codified until 1973 as MD. CODE ANN. art. 25, § 5).

or in any consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State ⁵³

The effect of this Act was to make inadmissible in the trial of misdemeanors evidence which is obtained by means of an illegal search and seizure.⁵⁴ This exclusionary rule was quite limited because, first, it only applied to misdemeanors, and second, certain counties were permitted to use evidence obtained from an illegal search and seizure in prosecuting the violations of gambling, lottery and alcoholic beverage laws.⁵⁵ The Legislature overruled *Meisinger* and created an exclusionary rule for illegally seized evidence with respect to misdemeanor cases.⁵⁶ Significantly, *Meisinger* dealt with misdemeanors only.

We turn next to the cases of *Wolf v. Colorado*⁵⁷ and *Mapp v. Ohio*.⁵⁸ *Wolf v. Colorado* held that the Fourth Amendment was applicable to the states, but that the exclusionary rule was not applicable to state proceedings.⁵⁹ *Mapp v. Ohio* overruled that portion of *Wolf*, and held that the Fourth Amendment's exclusionary rule *was* applicable to the states.⁶⁰

After *Wolf v. Colorado* and *Mapp v. Ohio* held that the Fourteenth Amendment did not require the states to adopt an exclusionary rule for evidence derived from an illegal search and seizure, the Maryland Legislature amended Article 27, section 551, the statute which addressed the return of illegally seized property. That statute provides for a civil proceeding for the return of property seized pursuant to a search warrant if there is no probable cause to support the issuance of the warrant.⁶¹ The initial form of section 551 included an exclusionary rule which was unlimited as to the nature of the offense involved, and unlike the Bouse Act, applied to felonies as well as

⁵³ *Silverstein v. State*, 6 A.2d 465, 466 (Md. 1939) (quoting art. 25, § 5).

⁵⁴ *Id.* at 468.

⁵⁵ *See Belton v. State*, 178 A.2d 409, 411 (Md. 1962).

⁵⁶ *See supra* notes 52-54 and accompanying text.

⁵⁷ 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁸ 367 U.S. 643 (1961).

⁵⁹ *Wolf*, 338 U.S. at 33.

⁶⁰ *Mapp*, 367 U.S. at 655-56.

⁶¹ *See* MD. ANN. CODE art. 27, § 551 (1987) (recodified in 2001 with the current version at MD. CODE ANN., CRIM. PROC. § 1-203 (West 2007)).

misdemeanors.⁶² The Legislature struck that proposed exclusionary rule from the bill before the bill was enacted. The court has held recently that section 551 does not include an exclusionary rule, although in the case of *Chu v. Anne Arundel County*, the court noted, in a footnote, that “[w]e do not intimate by the foregoing review any opinion as to whether an exclusionary rule might operate under Maryland law in contexts other than that of § 551.”⁶³

In the interim, the Bouse Act was repealed in 1973—a very curious occurrence. The Legislature repealed the Act as part of the Maryland Code revision project, and under the belief that based on *Mapp v. Ohio*, the Bouse Act was unconstitutional.⁶⁴

I pose the rhetorical questions: Why was the Bouse Act, a state statute creating an exclusionary rule specifically for misdemeanors, unconstitutional in light of *Mapp*? Is it simply because *Mapp* applies also to felonies? Why could not Maryland have *Mapp* as a constitutional matter, applying to felonies and misdemeanors, and the Bouse Act as a statutory matter applying only to misdemeanors?

The result of these developments is that today, in Maryland, other than the federal exclusionary rule, the court has not recognized an exclusionary rule for illegally seized evidence under Article 26.⁶⁵

Although the court has not found an exclusionary rule when considering search and seizure issues under Article 26, there have been occasions where the court has excluded evidence that was illegally seized. *Kostelec v. State*⁶⁶ is an interesting case. In that case, the petitioner was convicted of controlled dangerous substance violations.⁶⁷ He moved to suppress the evidence seized under an anticipatory search warrant.⁶⁸ The issue was

⁶² *Id.*

⁶³ *Chu v. Anne Arundel County*, 537 A.2d 250, 253 n.2 (Md. 1988).

⁶⁴ 1973 Spec. Sess. Md. Laws 332. The Revisor's note states that the Bouse Act was unconstitutional under *Mapp v. Ohio*. *Id.* (“‘Bouse Act’ similar statute held unconstitutional; see *Mapp v. Ohio*. 367 U.S. 643 1961).”).

⁶⁵ This discussion does not include exclusionary provisions for violations of the state wiretap or eavesdropping laws.

⁶⁶ 703 A.2d 160 (Md. 1997).

⁶⁷ *Id.* at 160.

⁶⁸ *Id.* at 160-61.

whether Article 27, section 551 authorized anticipatory search warrants.⁶⁹ The trial court denied the motion to suppress and Kostelec was convicted. The intermediate appellate court affirmed, holding "that anticipatory warrants did not violate the Fourth Amendment" and therefore did not violate Maryland law because Maryland search and seizure law "should be construed *in pari materia* with the Fourth Amendment to permit anticipatory search warrants."⁷⁰ On the merits, the Maryland Court of Appeals disagreed, and held that the search warrant was not authorized by section 551.⁷¹ The court recognized that if the violation of section 551(a) also violated the Fourth Amendment, suppression would be available as a remedy under federal law.⁷² However, the court assumed that the violation of the state statute was *not* a violation of the Fourth Amendment, but nonetheless reasoned that the evidence should be suppressed.⁷³

Following an extended discussion of the failure of the State to argue that section 551 did not contain an exclusionary rule, the court held that the evidence should be suppressed, "under the unique procedural history of this case."⁷⁴ The court reasoned as follows:

From the time Kostelec filed his motion to suppress in the circuit court through the grant of the writ of certiorari by this Court, this case proceeded on the assumption by Kostelec and by the representatives of the State that the remedy would be suppression of the evidence if the search warrant were issued in violation of § 551(a). Inasmuch as § 551(a) was violated and there has been no previous challenge to Kostelec's assertion of a right to suppression as the remedy for that violation, the motion to suppress should be granted under the unique procedural history of this case.⁷⁵

⁶⁹ *Id.* at 163.

⁷⁰ *Id.* at 162.

⁷¹ *Id.* at 165.

⁷² See *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁷³ *Kostelec*, 703 A.2d at 165 ("In our discussion of this new issue we shall assume that the violation of § 551(a) here is not also a violation of the Fourth Amendment.").

⁷⁴ *Id.* at 166.

⁷⁵ *Id.*

This case was remanded with instructions to suppress the evidence.⁷⁶

There are other occasions in which the court has ordered suppression of illegally or improperly seized evidence, *albeit* not under Article 26. In *Chase v. State*,⁷⁷ a violation of probation proceeding, which in Maryland is a civil proceeding, the court considered whether the Fourth Amendment exclusionary rule applied to illegally seized evidence.⁷⁸ The court concluded that the federal rule would not *generally* apply to our probation revocation proceedings and adopted the general rule that in revocation of probation proceedings, the exclusionary rule does not apply to bar evidence illegally seized by the police from the probationer.⁷⁹ Nonetheless, the court went on to hold that “when the officer has acted in bad faith and not as a reasonable officer would and should act in similar circumstances, the evidence should, in any event, be suppressed.”⁸⁰

*Sheetz v. Mayor and City Council of Baltimore*⁸¹ was a civil, administrative employee discharge case. Recognizing that the exclusionary rule of the Fourth Amendment does not apply ordinarily in employee discharge proceedings, the court held that “as a matter of Maryland administrative law, we are unwilling to hold that such evidence is always admissible.”⁸² The court held that where the police were motivated improperly to illegally seize evidence to benefit civil proceedings, such evidence is inadmissible in civil administrative discharge proceedings.⁸³ This all still leaves the question: What is the Maryland rule with respect to the Fourth Amendment Article 26, and the exclusion of illegally seized evidence?

Two recent cases are of interest. The first is *Fitzgerald v. State*.⁸⁴ Petitioner’s conviction rested upon evidence obtained after a dog purportedly detected illegal drugs by sniffing peti-

⁷⁶ *Id.*

⁷⁷ 522 A.2d 1348 (Md. 1987).

⁷⁸ *Id.* at 1351.

⁷⁹ *Id.* at 1362.

⁸⁰ *Id.*

⁸¹ 553 A.2d 1281 (Md. 1989).

⁸² *Id.* at 1284.

⁸³ *Id.* at 1285.

⁸⁴ 864 A.2d 1006 (Md. 2004).

tioner's apartment door from a public hallway.⁸⁵ The Maryland Court of Appeals first considered whether the dog sniff was a search under the Fourth Amendment, and held that a dog sniff of the exterior of a residence is not a search under the Fourth Amendment.⁸⁶ Petitioner urged the court to find that the dog sniff violated Article 26, and urged the court to adopt an exclusionary rule for evidence seized in violation of Article 26.⁸⁷ The court found that because the majority of state courts holding a dog sniff constituted a search under state constitutions apply a reasonable suspicion standard, and reasonable suspicion existed in the instant case, "[t]here is no need to determine whether this is a case in which Article 26 mandates our finding an illegal search, while the Fourth Amendment mandates a conclusion that no search occurred. Similarly, this is not the case to revisit whether Article 26 contains an exclusionary rule."⁸⁸ Judge Greene, writing in dissent, joined by Chief Judge Bell, would have broken "the tradition of reading Article 26 of the Maryland Declaration of Rights *in pari materia* with the Fourth Amendment . . . [and interpreted] Article 26, in such a fashion, so as to afford citizens greater protections than those as interpreted under the Fourth Amendment."⁸⁹ Clearly, the court left the door open to decide whether to proceed on independent state grounds and whether Article 26 contains an exclusionary rule.

The final case is *Parker v. State*.⁹⁰ In that case, petitioner argued that law enforcement officers' "no-knock" entry into petitioner's home violated the Fourth Amendment and Article 26.⁹¹ After the Maryland Court of Appeals granted the writ of certiorari, the United States Supreme Court decided *Hudson v. Michigan*,⁹² holding that the exclusionary rule of the Fourth Amendment does not apply to evidence obtained in violation of the knock and announce requirement embodied in the Fourth

⁸⁵ *Id.* at 1008.

⁸⁶ *Id.* at 1017.

⁸⁷ *Id.* at 1019.

⁸⁸ *Id.* at 1020.

⁸⁹ *Id.* at 1027 (Greene, J., dissenting).

⁹⁰ *Parker v. State*, No. 37 (Md. argued Nov. 3, 2006) (presently pending in the Court of Appeals).

⁹¹ *Id.*

⁹² 126 S. Ct. 2159 (2006).

Amendment.⁹³ Petitioner has fully briefed the independent state grounds issue, urging the court to hold that as a matter of Maryland law, exclusion is the appropriate remedy for evidence obtained in violation of knock and announce requirements of Article 26 and Maryland common law. The resolution of that case is for another day.

In sum, at least as of today, Maryland continues to resolve search and seizure issues arising under Article 26 of the Maryland Declaration of Rights in accordance with the jurisprudence of the United States Supreme Court and its interpretation of the Fourth Amendment.

⁹³ *Id.* at 2170-71.

SURVEY: STATE SEARCH AND SEIZURE ANALOGS

*Michael J. Gorman**

I. INTRODUCTION

In this article, one will not find analysis or commentary. Rather, this article is a walking stick, a rigid—but sturdy—companion for researchers exploring state constitutionalism. As such, it neither charts the proper path nor identifies potential impasses. Instead, it merely presents the law as it is. As with any trustworthy travel companion, it remains at your side, ready for when you’ve become fatigued intellectually in your journey and need something to lean on and return to.

This article is a state-by-state breakdown of search and seizure analogs and supporting case law. In describing each jurisdiction, I undertook considerable effort to present that jurisdiction’s doctrine as its high(est) court(s) articulated it. The reader will find therefore numerous quotations from those courts.

Before beginning the exposition, the author would like to recognize Associate Professor Stephen E. Henderson, of Widener University School of Law, who recently penned a piece concerning third-party information and state constitutional analogs.¹ That piece, while interesting in its own right, contains a wealth of information on contemporary state constitutional decisions from each state. For his contribution to the state constitutional discussion (and, in no small measure, to the comprehensiveness of this article), Professor Henderson deserves recognition here and in a larger-sized type.

* J.D. 2007, University of Mississippi; B.A., 2003, University of Kentucky. Law Clerk to the Honorable S. Allan Alexander, United States District Court for the Northern District of Mississippi. My gratitude to Thomas K. Clancy and Marc M. Harrold for their assistance in this project. As William Butler Yeats, a fellow Irishman wrote: “And, say my glory was I had such friends.”

¹ Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373 (2006).

II. SEARCH AND SEIZURE ANALOGS, STATE-BY-STATE

For each state, I report: (1) the search and seizure analog, (2) the analog's interpretation (i.e., divergence from or lockstep with constructions of Fourth Amendment protections), (3) if applicable, the *Analytical Framework* employed to construe the state analog, and (4) (again, if applicable) *Representative Departures* from the United States Supreme Court's Fourth Amendment jurisprudence.² The number of *Representative Departures* varies with each jurisdiction and is dependent on the volume and suitability of the case law available.

While I have diligently attempted to provide the most current (and concise) restatement of each state's interpretation of its search and seizure analog, my work (as with any human venture) may be incomplete or inaccurate. Therefore, I politely request that the reader bring any errors to my attention so I may take appropriate remedial measures.

1. ALABAMA

Analog: {ALA. CONST. art. I, § 5} "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

Interpretation: Although the Supreme Court of Alabama recognizes its authority to interpret its state analog differently, it has not diverged from federal interpretations of the Fourth Amendment when construing its state analog.³

² For conservation's sake I have omitted space for inapplicable items. So, for example, some states may only have two sub-headings: analog and interpretation. You may therefore presume that an absence of an item here means a corresponding absence there in that state's search and seizure jurisprudence.

³ See *Ex Parte Caffie*, 516 So. 2d 831, 837 (Ala. 1987) ("[W]e do not mean to imply that there is, of necessity, a one-to-one correspondence between the protections afforded by our state constitution and those afforded by the federal constitution."). *Ex Parte Caffie* focused on whether the exclusionary rule should apply to a probation revocation hearing. *Id.* at 831-32. After an adverse ruling, Caffie applied for rehearing to determine whether the court's ruling was valid under the Alabama and Federal Constitutions. *Id.* at 837. In disposing of the petition for rehearing, the Supreme Court of Alabama independently (and

2. ALASKA

Analogue: {ALASKA CONST. art. I, § 14} “The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

And, there is: {ALASKA CONST. art. 1, § 22} “The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.”

Interpretation: “As we have frequently noted, the Alaska constitutional guarantee against unreasonable searches and seizures is broader in scope than fourth amendment guarantees under the United States Constitution, at least in part because of the more extensive right of privacy guaranteed Alaskan citizens by article I, section 22 of our state constitution.”⁴

Analytical Framework: “[W]e are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.”⁵ In the search and seizure context, the Alaska Supreme Court often uses Sections 14 and 22 conjunctively, as a means to provide greater rights.⁶

cursory) analyzed the issue under the Alabama Constitution, arriving at the same conclusion. *Id.*

⁴ Reeves v. State, 599 P.2d 727, 734 (Alaska 1979).

⁵ Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (explaining general method of state constitutional interpretation).

⁶ See State v. Jones, 706 P.2d 317, 320-22 (Alaska 1985).

Representative Departures:

- Alaska rejects the totality of the circumstances test articulated in *Illinois v. Gates*⁷, relying on the *Aguilar v. Texas*⁸ and *Spinelli v. United States*⁹ tests as a matter of state constitutional law.¹⁰

3. ARIZONA

Analog: {ARIZ. CONST. art. II, § 8} “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Interpretation: “[D]espite suggestions that Article 2, Section 8 may exceed the scope of the Fourth Amendment, in general our courts have found Arizona’s Constitutional protection of privacy to be consistent or coextensive with that of the Fourth Amendment.”¹¹

Analytical Framework: Without articulating a test (or set of criteria), the Arizona Supreme Court looks to the language of its analog, its history, and federal and state precedent, when deciding whether a departure is warranted.¹²

Representative Departures:

- Warrantless entries into home are subject to this special rule: “As a matter of Arizona law, officers may not make a warrantless entry into a home in the absence of exigent circumstances”¹³ “The recognized exceptions to the warrant requirement, aside from consent, which can be considered exigent are 1) response to an emergency, 2) hot pursuit, 3) proba-

⁷ 462 U.S. 213 (1983).

⁸ 378 U.S. 108 (1964).

⁹ 393 U.S. 410 (1969).

¹⁰ *Jones*, 706 P.2d at 321-25.

¹¹ *Petersen v. City of Mesa*, 63 P.3d 309, 312 (Ariz. Ct. App. 2003), *vacated on other grounds*, 83 P.3d 35 (Ariz. 2004) (en banc).

¹² See *State v. Martin*, 679 P.2d 489, 496-99 (Ariz. 1984).

¹³ *State v. Ault*, 724 P.2d 545, 549 (Ariz. 1986).

bility of destruction of evidence, and 4) possibility of violence.”¹⁴

4. ARKANSAS

Analogy: {ARK. CONST. art. II, § 15} “The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”

Interpretation: “[T]here are occasions and contexts in which federal Fourth Amendment interpretation provides adequate protections against unreasonable law enforcement conduct; however, there are also occasions when this court will provide more protection under the Arkansas Constitution than that provided by the federal courts.”¹⁵

Analytical Framework: In determining whether to diverge, one “pivotal inquiry” is whether the Arkansas Supreme Court “has traditionally viewed an issue differently than the federal courts.”¹⁶

Representative Departures:

- Pretextual arrests are illegal under the Arkansas Constitution;¹⁷ and,
- Nighttime incursions on an individual’s curtilage are illegal.¹⁸

¹⁴ *Id.* at 549. In *Ault*, lacking a warrant and exigency, the officers’ seizure of evidence in plain view, coupled with a spirited argument for inevitable discovery, was insufficient, necessitating suppression. *Id.* at 550-51.

¹⁵ *State v. Sullivan*, 74 S.W.3d 215, 218 (Ark. 2002) (holding that pretextual arrests violate Arkansas Constitution).

¹⁶ *Id.*

¹⁷ *Id.* at 217-18 (rejecting, as a matter of state constitutional law, the objective analysis of *Whren v. United States*, 517 U.S. 806 (1996)).

¹⁸ *Griffin v. State*, 67 S.W.3d 582 (Ark. 2002).

5. CALIFORNIA

Analog: {CAL. CONST. art. I, § 13} "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

Interpretation: "[S]ince voter approval of Proposition 8 in June 1982, state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard."¹⁹

6. COLORADO

Analog: {COLO. CONST. art. II, § 7} "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

Interpretation: To determine whether a particular interest is protected under the Colorado Constitution, the Colorado Supreme Court employs "a two-part inquiry"²⁰ mirroring the federal inquiry announced in *Smith v. Maryland*.²¹ "Although Article II, Section 7 of the Colorado Constitution is substantially similar to its federal counterpart, we are not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections."²²

¹⁹ *People v. Camacho*, 3 P.3d 878, 882 (Cal. 2000) ("Our state constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the Federal Constitution as interpreted by the United States Supreme Court."). For the limiting provision, see CAL. CONST. art. I, § 28(d).

²⁰ *People v. Oates*, 698 P.2d 811, 814 (Colo. 1985).

²¹ *Smith v. Maryland*, 442 U.S. 735 (1979).

²² *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983).

Analytical Framework: While the Supreme Court of Colorado has not articulated a fixed test (or set of factors), it looks to its past precedent when determining whether to provide greater protections under the Colorado Constitution.²³

Representative Departures:

- Governmental use of telephone toll records is a search under the Colorado Constitution;²⁴
- Government-installed pen register is a search under the Colorado Constitution;²⁵ and,
- “[A] dog sniff search of a person’s automobile in connection with a traffic stop that is prolonged beyond its purpose to conduct a drug investigation . . . constitutes a search and seizure requiring reasonable suspicion of criminal activity.”²⁶

7. CONNECTICUT

Analog: {CONN. CONST. art. I, § 7} “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.”

Interpretation: “It is well settled that we are not bound by the decisions of the United States Supreme Court in interpreting the contours of [the Connecticut Constitution] . . . and federal constitutional law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights.”²⁷

²³ *People v. Haley*, 41 P.3d 666, 672 (Colo. 2001) (“Based upon our precedent under the Colorado Constitution, we conclude . . .” (emphasis added)).

²⁴ *People v. Corr*, 682 P.2d 20 (Colo. 1984).

²⁵ *Sporleder*, 666 P.2d at 139-40.

²⁶ *Haley*, 41 P.3d at 672.

²⁷ *State v. Mikolinski*, 775 A.2d 274, 278 (Conn. 2001) (quotations and citations omitted).

Analytical Framework: "In determining whether the protections secured by [the Connecticut Constitution] extend beyond those secured by the fourth amendment to the United States constitution, we consider several factors: (1) the text of the constitutional provision; (2) holdings and dicta of Connecticut appellate courts; (3) federal precedent; (4) sister state decisions; (5) historical aspects, including the historical constitutional setting and the debates of the framers; and (6) economic and sociological or policy considerations."²⁸

Representative Departures:

- Police may not make a warrantless search of an impounded vehicle;²⁹ and,
- Connecticut does not recognize the "good faith" exception to the exclusionary rule.³⁰

8. DELAWARE

Analog: {**DEL. CONST. art. I, § 6**} "The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation."

Interpretation: "The Delaware Constitution, like the constitutions of certain other states, may provide individuals with greater rights than those afforded by the United States Constitution."³¹

Analytical Framework: The Delaware Supreme Court identified these factors: (1) textual language, (2) legislative history, (3) pre-

²⁸ *Id.* (adopting the test articulated in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), as controlling for analyzing sobriety checkpoints under Connecticut Constitution).

²⁹ *State v. Miller*, 630 A.2d 1315 (Conn. 1993).

³⁰ *State v. Marsala*, 579 A.2d 58 (Conn. 1990).

³¹ *Jones v. State*, 745 A.2d 856, 863 (Del. 1999) ("For example, we have held that the Delaware Constitution provides greater rights . . . in the preservation of evidence used against a defendant, the right of confrontation, the right to counsel, and the right to trial by jury." (citations omitted)).

existing state law, (4) structural differences, (5) matters of particular state interest or local concern, (6) state traditions, and (7) public attitudes.³² The Court then added this advisory:

The enumerated criteria, which are synthesized from a burgeoning body of authority, are essentially illustrative, rather than exhaustive. They share a common thread—that distinctive and identifiable attributes of a state government, its laws and its people justify recourse to the state constitution as an independent source for recognizing and protecting individual rights.³³

Representative Departures:

- Under the Delaware Constitution, an individual is “seized” when a police officer orders him to stop and remove his hands from his coat.³⁴

9. FLORIDA

Analogy: {**FLA. CONST. art. I, § 12**} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.”

Additionally, there is: {**FLA. CONST. art I, § 23**} “Every natural person has the right to be let alone and free from gov-

³² *Id.* at 864-65 (explaining each factor more fully).

³³ *Id.* at 865 (citations omitted).

³⁴ *Id.* at 856 (rejecting *California v. Hodari D.*, 499 U.S. 621 (1991), as a matter of state law).

ernmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

Interpretation: From its text, Florida's search and seizure analog forecloses divergence. However, the Florida Supreme Court may provide greater protections under Section 23. "The right of privacy, assured to Florida's citizens, demands that individuals be free from uninvited observation of or interference in those aspects of their lives which fall within the ambit of this zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest."³⁵ The Florida Supreme Court seems reticent to find additional search and seizure protections in the privacy provision of the Florida Constitution, despite its open textured nature.³⁶

10. GEORGIA

Analog: {GA. CONST. art. I, § I, ¶ XIII} "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized."

Interpretation: "The Georgia constitutional provisions regarding search and seizure . . . are substantially the same as the Fourth Amendment provisions of the U.S. Constitution."³⁷

³⁵ Shaktman v. State, 553 So. 2d 148, 150 (Fla. 1989) (requiring reasonable suspicion for pen registers as purely a matter of individual privacy).

³⁶ See State v. Jimeno, 588 So. 2d 233 (Fla. 1991) ("[O]ur right of privacy provision, article I, section 23, does not modify the applicability of article I, section 12, particularly since section 23 was adopted prior to the present section 12.").

³⁷ State v. Gallup, 512 S.E.2d 66, 69 (Ga. Ct. App. 1999); Smoot v. State, 128 S.E. 909, 910 (Ga. 1925) (noting that state provision follows the Fourth Amendment).

Representative Departures:

- As a matter of statutory law, Georgia does not recognize the “good faith” exception.³⁸

11. HAWAII

Analogue: {HAW. CONST. art. I, § 7} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.”

Interpretation: “We recognize that, as the ultimate judicial tribunal with final unreviewable authority to interpret and enforce the Hawai‘i Constitution, we may give broader protection under the Hawai‘i Constitution than that given by the federal constitution . . . when logic and a sound regard for the purposes of those protections have so warranted.”³⁹

Analytical Framework: The Hawaii Supreme Court offers no particular mode of analysis (or set of factors). Rather, it will diverge “when logic and a sound regard for the purposes of those protections [in the Hawaii Constitution] have so warranted.”⁴⁰

Representative Departures:

- Under the Hawaii Constitution, an individual has a reasonable expectation of privacy in his trash bags located on his property.⁴¹

³⁸ See *Gary v. State*, 422 S.E.2d 426 (Ga. 1992); GA. CODE ANN. § 17-5-30 (2007).

³⁹ *State v. Tau‘a*, 49 P.3d 1227, 1239 (Haw. 2002) (quotations and citations omitted); see also *State v. Tanaka*, 701 P.2d 1274, 1276 (Haw. 1985) (“In our view, article I, § 7 of the Hawai‘i Constitution recognizes an expectation of privacy beyond the parallel provision in the Federal Bill of Rights.”).

⁴⁰ *Tanaka*, 701 P.2d at 1276.

⁴¹ *Id.* at 1276-77.

12. IDAHO

Analogue: {IDAHO CONST. art. I, § 17} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.”

Interpretation: “Although the wording of the two constitutional provisions is similar, this Court has at times construed the provisions of our Constitution to grant greater protection than that afforded under the United States Supreme Court’s interpretation of the federal Constitution.”⁴²

Analytical Framework: The Idaho Supreme Court provides “greater protection to Idaho citizens based on the uniqueness of our state, our Constitution, and our long-standing jurisprudence.”⁴³

Representative Departures:

- Idaho has an expanded definition of “curtilage;”⁴⁴
- Sobriety roadblocks are illegal under the Idaho Constitution;⁴⁵ and,
- Government use of a pen register constitutes a “search” under the Idaho Constitution.⁴⁶

13. ILLINOIS

Analogue: {ILL. CONST. art. I, § 6} “The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping de-

⁴² State v. Fees, 90 P.3d 306, 313 (Idaho 2004).

⁴³ *Id.* at 314; *see also* State v. Donato, 20 P.3d 5, 6-9 (Idaho 2001) (discussing when Idaho has departed from United States Supreme Court jurisprudence).

⁴⁴ *See* State v. Webb, 943 P.2d 52 (Idaho 1997).

⁴⁵ State v. Henderson, 756 P.2d 1057 (Idaho 1988) (decided two years prior to Michigan Dep’t of State Police v. Sitz, 496 U.S. 444 (1990)).

⁴⁶ State v. Thompson, 760 P.2d 1162 (Idaho 1988).

vices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.”

Interpretation: “This court has construed the search and seizure language found in section 6 in a manner that is consistent with the Supreme Court’s fourth amendment jurisprudence.”⁴⁷

Analytical Framework: “We must find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal constitution.”⁴⁸

Representative Departures: Despite the Illinois Supreme Court’s statements, it has recognized the following departures under the privacy portion of the state analog:

- An individual has a reasonable expectation of privacy in telephone records under the Illinois Constitution;⁴⁹
- An individual has a reasonable expectation of privacy in financial records;⁵⁰ and,
- An individual has a reasonable expectation of privacy in hair samples, necessitating probable cause, or a warrant.⁵¹

⁴⁷ Fink v. Ryan, 673 N.E.2d 281, 288 (Ill. 1996).

⁴⁸ People v. Mitchell, 650 N.E.2d 1014, 1017-18 (Ill. 1995) (“Given the express intent of the drafters to leave unaltered the search and seizure clause of section 6, the additional language in our section 6 [relating to invasions of privacy or interceptions of communications] provides no basis for an interpretation different from the Federal search and seizure clause.”).

⁴⁹ People v. DeLaire, 610 N.E.2d 1277, 1282 (Ill. Ct. App. 1993) (“We believe that citizens have a legitimate expectation that their telephone records will not be disclosed. . . . *Miller* and *Smith* are not controlling because the Illinois Constitution provides greater protection than the Federal constitution.” (citing *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979), respectively)).

⁵⁰ People v. Jackson, 452 N.E.2d 85, 88-90 (Ill. Ct. App. 1983). Westlaw’s Keycite feature indicates that *Jackson* is no longer good law. The author, however, was unable to locate an Illinois decision questioning the validity of *Jackson*.

⁵¹ *In re May 1991 Will Co. Grand Jury*, 604 N.E.2d 929, 934-37 (Ill. 1992) (“Appellants assert that the Illinois Constitution offers greater protection against the invasion of an individual’s privacy rights than does the Federal Constitution. We agree.”).

14. INDIANA

Analog: {IND. CONST. art. I, § 11} “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”

Interpretation: “Although this language [of the Indiana Constitution] tracks the Fourth Amendment verbatim, Indiana has explicitly rejected the expectation of privacy as a test of the reasonableness of a search or seizure. The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances.”⁵²

15. IOWA

Analog: {IOWA CONST. art. I, § 8} “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.”

Interpretation: “Cases interpreting the federal constitution are persuasive in our interpretation of the state constitution because the federal and state search-and-seizure clauses are similar. . . . Decisions interpreting the federal constitution, however, are not binding on us with respect to the Iowa Constitution.”⁵³

“We have an interest in harmonizing our constitutional decisions with those of the Supreme Court when reasonably possible, even though we recognize and will jealously guard our right and duty to differ in appropriate cases.”⁵⁴

⁵² Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005).

⁵³ State v. Hoskins, 711 N.W.2d 720, 725 (Iowa 2006) (citations omitted).

⁵⁴ State v. Olsen, 293 N.W.2d 216, 219-20 (Iowa 1980).

Analytical Framework: Without articulating factors, the Iowa Supreme Court noted that departure requires some basis: “Because [the appellant] has not asserted and we have not found a basis to distinguish the protection afforded by the Iowa Constitution from those afforded by the federal constitution under the facts of this case, our analysis applies equally to both the state and federal grounds.”⁵⁵

16. KANSAS

Analogue: {KAN. CONST. Bill of Rights § 15}: “The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.”

Interpretation: “This court . . . can construe our state constitutional provisions independent of federal interpretation of corresponding provisions.”⁵⁶ Nevertheless, “this court has never extended state constitutional protections beyond federal guarantees.”⁵⁷

17. KENTUCKY

Analogue: {KY. CONST. § 10} “The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.”

⁵⁵ State v. Carter, 696 N.W.2d 31, 37 (Iowa 2005).

⁵⁶ State v. Schultz, 850 P.2d 818, 823 (Kan. 1993).

⁵⁷ *Id.* at 824. Things do not appear to have changed, as the author finds no contrary, post-1993 Kansas opinion.

Interpretation: "Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment."⁵⁸

18. LOUISIANA

Analog: {LA. CONST. art. I, § 5} "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."

Interpretation: "This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution."⁵⁹

Analytical Framework: The Louisiana Supreme Court considers: (1) the text of the provision; (2) its ratification history; and, (3) federal and sister precedent, to determine whether a departure is warranted.⁶⁰

Representative Departure:

- "[T]he search of the defendant's automobile, without probable cause, and in the absence of any of the circumstances which have been recognized by this court as justifying a narrow exception to the warrant requirement, plainly constituted an

⁵⁸ *Colbert v. Commonwealth*, 43 S.W.3d 777, 780 (Ky. 2001); *see also* *Commonwealth v. Mobley*, 160 S.W.3d 783 (Ky. 2005).

⁵⁹ *State v. Jackson*, 764 So. 2d 64, 71 n.10 (La. 2000) (overruling *State v. Church*, 538 So. 2d 993 (La. 1989) (prohibiting use of automobile checkpoint stops)).

⁶⁰ *Id.* at 70-72.

unreasonable search, seizure or invasion of privacy” in violation of the Louisiana Constitution.⁶¹

19. MAINE

Analogue: {**ME. CONST. art. I, § 5**} “The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation.”

Interpretation: “The Fourth Amendment to the U.S. Constitution, and Article 1, Section 5 of the Maine Constitution, offer identical protection against unreasonable searches and seizures.”⁶²

20. MARYLAND

Analogue: {**MD. CONST. Declaration of Rights art. 26**} “That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.”

Interpretation: “Article 26 of the Maryland Declaration of Rights is *in pari materia* with the Fourth Amendment, and decisions of the Supreme Court interpreting the Fourth Amendment are entitled to great respect in construing Article 26.”⁶³ However, the Maryland Court of Appeals recognizes its ability to diverge from United States Supreme Court interpretation.⁶⁴ Some scholars

⁶¹ State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1981) (rejecting New York v. Belton, 453 U.S. 454 (1981), as a matter of state constitutional law).

⁶² State v. Patterson, 868 A.2d 188, 191 (Me. 2005); *see also* State v. Gulick, 759 A.2d 1085, 1087 (Me. 2000) (same).

⁶³ Gadson v. State, 668 A.2d 22, 26 n.3 (Md. 1995); *see also* Gahan v. State, 430 A.2d 49, 53-55 (Md. 1981).

⁶⁴ *See, e.g., Gahan*, 430 A.2d at 55 (“[A]lthough a clause of the United States Constitution and one in our own Declaration of Rights may be “*in pari materia*,” and thus decisions applying one provision are persuasive authority in cases involving the other, we reiterate

have attributed Maryland's lock-step interpretation to its analog's textual limitation—as written, Article 26 seems to provide less protection.⁶⁵

21. MASSACHUSETTS

Analog: {**MASS. CONST. Declaration of Rights pt. 1, art. XIV**} “Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.”

Interpretation: “It is by now firmly established that, in some circumstances, art. 14 affords greater protection against arbitrary government action than do the cognate provisions of the Fourth Amendment.”⁶⁶

Analytical Framework: “As we do with other provisions of the State Constitution, we construe the language of this constitutional provision in light of the circumstances under which it was framed, the causes leading to its adoption, the imperfections hoped to be remedied, and the ends designed to be accomplished.”⁶⁷

that each provision is independent, and a violation of one is not necessarily a violation of the other.” (quotations and citations omitted)).

⁶⁵ See, e.g., Thomas K. Clancy, *A Vision of Search and Seizure Protection*, 34-FEB. MD. BAR J. 11 (2001) (describing textual limitations of Maryland's analog).

⁶⁶ *Jenkins v. Chief Justice of the Dist. Court Dep't*, 619 N.E.2d 324, 330 & n.16 (Mass. 1993) (collecting Massachusetts cases providing greater protection under Massachusetts Constitution).

⁶⁷ *Id.* at 330 (quotation and citation omitted). *Jenkins* also contains a thorough analysis of these factors, one worthy of reference and imitation. *Id.* at 330-33. As an aside, the Massachusetts Supreme Judicial Court noted that, “Massachusetts has not had an exclusionary rule as part of its common law or under art. 14, and, consequently, there has been little incentive for defendants to challenge the existence of probable cause on State com-

Representative Departures:

- Massachusetts rejects *California v. Hodari D.*^{68,69} and,
- Similarly, as a matter of state law, Massachusetts has rejected the “totality of the circumstances” approach espoused in *Illinois v. Gates*,⁷⁰ concluding that “the principles developed under [*Aguilar v. Texas*⁷¹ and *Spinelli v. United States*⁷²], if not applied hypertechnically, provide a more appropriate structure for probable cause inquiries under art. 14.”⁷³

22. MICHIGAN

Analog: {MICH. CONST. art. I, § 11} “The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.”⁷⁴

Interpretation: “Michigan’s constitutional prohibition against unreasonable searches and seizures ‘is to be construed to provide the same protection as that secured by the Fourth Amendment

mon law or constitutional grounds.” *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985).

⁶⁸ 499 U.S. 621 (1991) (holding that an individual is not “seized” within meaning of Fourth Amendment when a police officer pursues him with intent to question him).

⁶⁹ *Commonwealth v. Stoute*, 665 N.E.2d 93, 95-97 (Mass. 1996).

⁷⁰ 462 U.S. 213 (1983).

⁷¹ 378 U.S. 108 (1964).

⁷² 393 U.S. 410 (1969).

⁷³ *Upton*, 476 N.E.2d at 556.

⁷⁴ The final sentence of Michigan’s analog is assuredly an interesting one. It is an instance in which analog provides less protection than does the Fourth Amendment and, accordingly, when triggered, Michigan courts may only consider Fourth Amendment protections. See *People v. Custer*, 630 N.W.2d 870, 876 n.2 (Mich. 2001) (“[I]f the [narcotic drug] has been seized outside the curtilage of a dwelling house, Michigan’s constitutional prohibition . . . would not be applicable, although the Fourth Amendment’s would be.”).

. . . absent, 'compelling' reason to impose a different interpretation."⁷⁵

Analytical Framework: In determining whether a "compelling reason" exists, the Michigan Supreme Court noted this primary factor: "It is a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the people adopting it."⁷⁶

Representative Departures: A review of Michigan case law reveals no controlling, precedential search and seizure opinion in which the Michigan Supreme Court found a "compelling reason" justifying departure.⁷⁷

23. MINNESOTA

Analog: {MINN. CONST. art. I, § 10} "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

Interpretation: "It is axiomatic that we are free to interpret the Minnesota Constitution as affording greater protection against unreasonable search and seizures than the United States Constitution. . . . But, in independently safeguarding these protections [embodied in Minnesota's Constitution] we will not cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution."⁷⁸

⁷⁵ *Id.* at 876 n.2 (quoting *People v. Collins*, 475 N.W.2d 684 (Mich. 1991)).

⁷⁶ *Collins*, 475 N.W.2d at 694 (quoting *Holland v. Garden City Clerk*, 300 N.W. 777, 778-79 (Mich. 1941)).

⁷⁷ *See, e.g., id.* at 694-95 (demonstrating that history and text of Michigan's analog make the "compelling reason" argument a tough sell).

⁷⁸ *State v. Askerooth*, 681 N.W.2d 353, 361-62 (Minn. 2004) (quotation and citation omitted).

Analytical Framework: "Indeed, many principled bases have been articulated for state courts to construe their state constitutions as more protective than their federal counterparts, including: variations in text, constitutional history, early state precedent construing the applicable provision of the state constitution, relatedness of the subject matter to state-level enforcement, presence of issues that are unique to the state, and a determination that a more expansive reading of the state constitution represents the better rule of law."⁷⁹

Besides these factors, a newly articulated federal doctrine that represents a "sharp departure" from Minnesota's "traditional understanding of the protections from unreasonable seizure provides a similar principled basis for us to look to"⁸⁰ the Minnesota Constitution.

Representative Departures:

- Rejecting the analysis in *California v. Hodari D.*,⁸¹ Minnesota adheres to a rule of reasonableness to determine whether an individual is "seized" within meaning of the Minnesota Constitution;⁸²
- Minnesota rejects *Michigan Department of State Police v. Sitz*,⁸³ requiring "police to have an objective individualized articulable suspicion of criminal wrongdoing *before* subjecting a driver to an investigative stop[.]"⁸⁴ and,
- Minnesota's Constitution provides distinct protection from the expansion of traffic stops to include intrusive police questioning when there is no reasonable articulable suspicion to justify the questioning.⁸⁵

⁷⁹ State v. Harris, 590 N.W.2d 90, 97-98 (Minn. 1999). Although stating that other state high courts have used these procedures, the Minnesota Supreme Court, if not expressly, then impliedly adopted them. See *id.* at 98 (After outlining the factors, stating: "It is within this context that we proceed . . .").

⁸⁰ *Askerooth*, 681 N.W.2d at 362.

⁸¹ 499 U.S. 621 (1991) (holding that an individual is not "seized" within meaning of Fourth Amendment when a police officer pursues him with intent to question him).

⁸² *In re E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993).

⁸³ 496 U.S. 444 (1990).

⁸⁴ *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994).

⁸⁵ State v. Fort, 660 N.W.2d 415, 419 (Minn. 2003).

24. MISSISSIPPI

Analog: {MISS. CONST. art. III, § 23} “The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.”

Interpretation: “Section 23 of the Mississippi Constitution provides greater protections to our citizens than those found within the United States Constitution.”⁸⁶ “[T]he protection afforded by Section 23 of our Constitution should be liberally construed in favor of our citizens and strictly construed against the state.”⁸⁷

Analytical Framework: Despite a handful of departures, the Mississippi Supreme Court (and, for sure, the Mississippi Court of Appeals) has not articulated a framework to determine whether to interpret the Mississippi Constitution independently. Nevertheless, in departing, the Court unsurprisingly has looked to precedent.⁸⁸

Representative Departures:

- Mississippi’s analog provides greater privacy protection: “Where the proof shows that a portion of a residence is in the sole, separate, and exclusive possession of an individual other

⁸⁶ *Graves v. State*, 708 So. 2d 858, 861 (Miss. 1997); *but see Sasser v. City of Richland*, 850 So. 2d 206, 208-09 (Miss. Ct. App. 2003) (“In view of the striking similarities between the Fourth Amendment and Article 3, Section 23, of the Mississippi Constitution and the lack of a history of differentiation between the two by the Mississippi Supreme Court, we do not find a tenable basis to accept [appellant’s] contention . . .”). The Mississippi Court of Appeals, I respectfully submit, erred in writing this statement, as the Mississippi Supreme Court has in fact provided greater protections under its analog. *See Graves*, 708 So. 2d at 861. Moreover, appellant’s counsel failed to inform the Court of Appeals of the *Graves* decision. *See Sasser*, 850 So. 2d at 208-09 (“[W]e observe that Sasser cites the Court to no authority indicating that the Mississippi Supreme Court has held the relevant language of the Mississippi Constitution affords a higher level of insulation from searches and seizures . . .”).

⁸⁷ *Scott v. State*, 266 So. 2d 567, 569-70 (Miss. 1972).

⁸⁸ *See, e.g., Graves*, 708 So. 2d at 861 (“However, this Court has found that the Mississippi Constitution extends greater protections of an individual’s reasonable expectation of privacy than those enounced under Federal law.”); *see also Scott*, 266 So. 2d at 569-70 (citing past opinions creating a greater privacy protection in state’s search and seizure analog).

than the one named by the search warrant, that individual has a reasonable expectation of privacy in his or her solely occupied portion.”⁸⁹

25. MISSOURI

Analogue: {**MO. CONST. art. I, § 15**} “That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.”

Interpretation: “Missouri’s constitutional ‘search and seizure’ guarantee, article I, section 15, is co-extensive with the Fourth Amendment.”⁹⁰

26. MONTANA

Analogue: {**MONT. CONST. art. II, § 11**} “The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.”

Additionally, there is: {**MONT. CONST. art. II, § 10**} “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”

Interpretation: In considering the validity of a search or seizure under Montana law, the Court:

will look to the Montana Constitution, to applicable Montana statutes and to relevant Montana case law, and, as in the past,

⁸⁹ *Graves*, 708 So. 2d at 861 (rejecting *Maryland v. Garrison*, 480 U.S. 79 (1987)).

⁹⁰ *State v. Deck*, 994 S.W.2d 527, 534 (Mo. 1999) (en banc); *see also* *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. 1996) (en banc); *State v. Pike*, 162 S.W.3d 464, 472 (Mo. 2005) (en banc).

will not feel compelled to "march lock-step" with federal courts. States are free to grant citizens greater protections based on state constitutional provisions than the United States Supreme Court divines from the United States Constitution.

...

As long as we guarantee the minimum rights established by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution.

...

In addition, we have held that Montana's unique constitutional language [its privacy provision, § 10] affords citizens a greater right to privacy, and therefore, broader protection than the Fourth Amendment in cases involving searches of, or seizures from, private property.⁹¹

Analytical Framework: "When analyzing search and seizure questions that specifically implicate the right of privacy, this Court must consider Sections 10 and 11 of Article II of the Montana Constitution."⁹²

Section 11 "protects citizens from unreasonable searches and seizures and requires that search warrants be issued only after probable cause for such a warrant has been established, and that the warrant provides specific information."⁹³ Section 10 "grants Montana citizens a specific right to privacy" and "is the cornerstone of protections against unreasonable searches and seizures."⁹⁴ Taken together, the Court has "held that the range of warrantless searches which may be lawfully conducted under the Montana Constitution is narrower than the corresponding range of searches that may be lawfully conducted pursuant to the federal Fourth Amendment."⁹⁵

⁹¹ State v. Hardaway, 36 P.3d 900, 909 (Mont. 2001) (citations omitted).

⁹² *Id.* at 909 (citing State v. Hubbel, 951 P.2d 971, 975 (Mont. 1997)).

⁹³ *Id.* at 909 (citation omitted).

⁹⁴ *Id.* at 910 (quotation and citations omitted).

⁹⁵ *Id.* (citation omitted).

Representative Departures:

- The warrantless, post-arrest swabbing of blood on defendant's hands was a "search" within the Montana Constitution's meaning;⁹⁶
- The Montana Supreme Court has "held that the defendant had a reasonable expectation of privacy in conversations with an undercover officer, and we rejected the holdings of prior federal cases that stated government agents do not need a warrant to record a conversation where one of the conversants consents;"⁹⁷ and,
- "[A] person has an expectation of privacy in his home, even after firefighters have lawfully entered the home and even if the firefighters discover contraband in plain view."⁹⁸

27. NEBRASKA

Analogue: {NEB. CONST. art. I, § 7} "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

Interpretation: "We have previously concluded, however, that the framers of the Nebraska Constitution intended that article 1, § 7, provide no greater rights than those afforded a defendant by the 4th and 14th amendments to the U.S. Constitution."⁹⁹

28. NEVADA

Analogue: {NEV. CONST. art I, § 18} "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by Oath or

⁹⁶ See *id.* at 907-10.

⁹⁷ *State v. Bassett*, 982 P.2d 410, 418 (Mont. 1999) (citing *State v. Solis*, 693 P.2d 518, 523 (Mont. 1984)).

⁹⁸ *Id.* at 418-19.

⁹⁹ *State v. Vermuele*, 453 N.W.2d 441, 446 (Neb. 1990); see also *State v. Havlat*, 385 N.W.2d 436, 440-41 (Neb. 1986).

Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized.”

Interpretation: “[I]t is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.”¹⁰⁰ “Although the Nevada Constitution and the United States Constitution contain similar search and seizure clauses, the United States Supreme Court has noted that states are free to interpret their own constitutional provisions as providing greater protections than analogous federal provisions.”¹⁰¹

Analytical Framework: The Nevada Supreme Court offers no criteria, or test, to determine whether a departure is warranted. In the past, the court has looked to past practices in the state,¹⁰² state public policy,¹⁰³ and decisions from its sister states.¹⁰⁴

Representative Departures:

- An officer must exercise *reasonable* discretion in deciding whether to execute a custodial arrest for a minor traffic violation;¹⁰⁵ and,
- “We now conclude that, under the Nevada Constitution, there must exist both probable cause and exigent circumstances for police to conduct a warrantless search of an automobile incident to a lawful custodial arrest.”¹⁰⁶

¹⁰⁰ State v. Harnisch, 954 P.2d 1180, 1182 (Nev. 1998) (quotation and citation omitted).

¹⁰¹ State v. Bayard, 71 P.3d 498, 502 (Nev. 2003) (quotation and citation omitted).

¹⁰² State v. Camacho, 75 P.3d 370, 374 (Nev. 2003) (“In light of our prior decisions. . .”).

¹⁰³ Harnisch, 954 P.2d at 1183 (“Any other interpretation would be contrary to our state’s strong public policy requiring police to obtain a warrant whenever feasible.”).

¹⁰⁴ See, e.g., Osburn v. State, 44 P.3d 523, 525 (Nev. 2002) (considering an Oregon opinion in whether to depart from federal standard concerning electronic monitoring devices attached to a vehicle’s exterior); Bayard, 71 P.3d at 502 (adopting a search and seizure standard from a Montana opinion).

¹⁰⁵ Bayard, 71 P.3d at 502 (rejecting Atwater v. City of Lago Vista, 532 U.S. 318 (2001), as a matter of Nevada constitutional law).

¹⁰⁶ Camacho, 75 P.3d at 374 (rejecting New York v. Belton, 453 U.S. 454 (1981), as a matter of Nevada constitutional law).

29. NEW HAMPSHIRE

Analogue: {N.H. CONST. pt. 1, art. 19} “Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law.”

Interpretation: “[A]lthough we have often treated Federal and New Hampshire constitutional protections similarly, our citizens are entitled to an independent interpretation of State constitutional guarantees.”¹⁰⁷

Analytical Framework: As the final authority on the law of its state, the New Hampshire Supreme Court “will first examine the New Hampshire Constitution [if the parties invoke its protections] and only then, if we find no protected rights thereunder, will we examine the Federal Constitution to determine whether it provides greater protection.”¹⁰⁸ “[W]e interpret part I, article 19, to reflect the intent of the framers that all searches and seizures must be reasonable.”¹⁰⁹

Representative Departures:

- An individual exhibits “an actual expectation of privacy in his trash because he place[s] it in black plastic bags with the expectation it would be picked up by authorized persons for eventual disposal.”¹¹⁰

¹⁰⁷ State v. Ball, 471 A.2d 347, 350 (N.H. 1983).

¹⁰⁸ Id. at 351.

¹⁰⁹ Id. at 352.

¹¹⁰ State v. Goss, 834 A.2d 316, 319 (N.H. 2003).

30. NEW JERSEY

Analogy: {N.J. CONST. art. I, ¶ 7} “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.”

Interpretation: “When the United States Constitution affords our citizens less protection than does the New Jersey Constitution, we have not merely the authority to give full effect to the State protection, we have the duty to do so.”¹¹¹

Analytical Framework: In interpreting the New Jersey Constitution, the court looks:

for direction to the United States Supreme Court, whose opinions can provide valuable sources of wisdom for us. But although that Court may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.¹¹²

Additionally, the New Jersey Supreme Court unsurprisingly looks to its precedent in determining whether to depart anew.¹¹³

Representative Departures:

- New Jersey’s Constitution does not have a “good faith” exception to its exclusionary rule;¹¹⁴

¹¹¹ State v. Hempele, 576 A.2d 793, 800 (N.J. 1990).

¹¹² *Id.* at 800 (quotation and citation omitted).

¹¹³ See, e.g., State v. McAllister, 875 A.2d 866, 873 (N.J. 2005) (“Despite the similar language [between Federal and New Jersey Constitutions], we have recognized that our Constitution affords our citizens greater protection against unreasonable searches and seizures than its federal counterpart.” (quotation and citation omitted)).

¹¹⁴ See State v. Novembrino, 519 A.2d 820 (N.J. 1987).

- Likewise, it permits a large class of individuals standing to challenge a search or a seizure;¹¹⁵ and,
- “In summary, article I, paragraph 7 applies to the search but not to the seizure of a garbage bag left on the curb for collection. Law-enforcement officials need no cause to seize the bag, but they must have a warrant based on probable cause to search it.”¹¹⁶

31. NEW MEXICO

Analogue: {N.M. CONST. art. II, § 10} “The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.”

Interpretation: “We reiterate that in exercising our constitutional duty to interpret the organic laws of this state, we independently analyze the New Mexico constitutional proscription against unreasonable searches and seizures.”¹¹⁷

Analytical Framework: The New Mexico Supreme Court wrote:

We reiterate that in exercising our constitutional duty to interpret the organic laws of this state, we independently analyze the New Mexico constitutional proscription against unreasonable searches and seizures. In so doing, we seek guidance from decisions of the United States Supreme Court interpreting the federal search and seizure provision, from the decisions of courts of our sister states interpreting their correlative state constitutional guarantees, and from the common law. However, when this Court cites federal opinions, or opinions from courts of sister states, in interpreting a New Mexico constitutional provision we do so not because we consider ourselves bound to do so by our understanding of federal or state doctrines, but because we

¹¹⁵ See *State v. Alston*, 440 A.2d 1311 (N.J. 1981).

¹¹⁶ See *Hempele*, 576 A.2d at 814.

¹¹⁷ *State v. Gutierrez*, 863 P.2d 1052, 1056 (N.M. 1993).

find the views expressed persuasive and because we recognize the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions.¹¹⁸

What's more, the New Mexico Supreme Court reviews: (1) the framers' intent; (2) historical application of its state search and seizure law; and, (3) the core of the text.¹¹⁹

Representative Departures: As a matter of state constitutional law, New Mexico rejects:

- the "good faith" exception;¹²⁰
- the totality of the circumstances analysis of probable cause, applying the two-pronged test derived from *Aguilar v. Texas*¹²¹ and *Spinelli v. United States*^{122,123} and, requires:
- that a warrantless public arrest must be based upon both probable cause and sufficient exigent circumstances.¹²⁴

32. NEW YORK

Analog: {N.Y. CONST. art. I, § 12} "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and *ex parte* orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the

¹¹⁸ *Id.* at 1056-57 (rejecting "good faith" exception to state exclusionary rule).

¹¹⁹ *See id.* at 1062-66 (engaging in a thorough analysis of state analog).

¹²⁰ *Id.* at 1060.

¹²¹ 378 U.S. 108 (1964).

¹²² 393 U.S. 410 (1969).

¹²³ *State v. Cordova*, 784 P.2d 30 (N.M. 1989) (rejecting *Illinois v. Gates*, 462 U.S. 213 (1983), as a matter of state law).

¹²⁴ *See Campos v. State*, 870 P.2d 117 (N.M. 1994); *see also* Wendy F. Jones, Trends in New Mexico Law: Note, *State Constitutional Law—New Mexico Requires Exigent Circumstances for Warrantless Public Arrests*: *Campos v. State*, 25 N.M. L. REV. 315 (1995).

particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.”

Interpretation: The New York Court of Appeals wrote:

We have observed that because the search and seizure language of the Fourth Amendment and of article I, § 12 is identical, they generally confer similar rights Nevertheless, this Court has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution when a longstanding New York interest was involved.¹²⁵

Analytical Framework: The court of appeals looks to *inter alia*: (1) the history of the constitutional provisions; (2) the framers’ intent; and, (3) the consistency with precedent.¹²⁶

Representative Departures:

- New York rejects the “open field” doctrine articulated in *Oliver v. United States*,¹²⁷ providing greater protection under state analog;¹²⁸
- “[R]andom warrantless searches of vehicle dismantling businesses to determine whether such businesses are trafficking in stolen automobile parts” is an unreasonable search under the New York Constitution;¹²⁹ and,
- New York rejects the “totality of the circumstances” test.¹³⁰

33. NORTH CAROLINA

Analog: {N.C. CONST. art. I, § 20} “General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize

¹²⁵ *People v. Robinson*, 767 N.E.2d 638, 642 (N.Y. 2001) (citations omitted).

¹²⁶ *See People v. Scott*, 593 N.E.2d 1328, 1335-37 (N.Y. 1992) (engaging in thorough analysis of factors).

¹²⁷ 466 U.S. 170 (1984).

¹²⁸ *Scott*, 593 N.E.2d 1328.

¹²⁹ *People v. Keta*, 593 N.E.2d 1328, 1339 (N.Y. 1992) (consolidated with *Scott*, 593 N.E.2d 1328, but decided separately).

¹³⁰ *See People v. Griminger*, 524 N.E.2d 409 (N.Y. 1988) (opting instead for two-part *Aguilar-Spinelli* test).

any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted."

Interpretation: The North Carolina Supreme Court wrote:

[T]here is nothing to indicate anywhere in the text of Article I, Section 20 any enlargement or expansion of rights beyond those afforded in the Fourth Amendment as applied to the states by the Fourteenth Amendment. In terms of modern day jurisprudence and actual practice, it is abundantly clear that the language of this provision of our Constitution, relating entirely to "general warrants," of the past (while still relevant to protect against any recurrence of the historic abuses specified), should not be viewed as a vehicle for any inventive expansion of our law.¹³¹

Representative Departures:

- North Carolina does not recognize the "good faith" exception as a matter of state constitutional and statutory law.¹³²

34. NORTH DAKOTA

Analogy: {N.D. CONST. art. I, § 8} "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

Interpretation: "Although as a matter of state constitutional law [the North Dakota Supreme Court] may provide the citizens of our state greater protection in interpreting [its] State Constitution than the safeguards guaranteed by a parallel provision of the Federal Constitution," it has not.¹³³

¹³¹ State v. Garner, 417 S.E.2d 502, 506 (N.C. 1992).

¹³² See State v. Carter, 370 S.E.2d 553, 559 (N.C. 1988) (concluding that state statute, representing longstanding state public policy to exclude unconstitutionally obtained evidence, justifies a constitutional rejection of "good faith" exception).

¹³³ State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988).

35. OHIO

Analogue: {OHIO CONST. art. I, § 14} “The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.”

Interpretation: “[W]e are disinclined to impose greater restrictions in the absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment. . . . It is our opinion that the reach of Section 14, Article I, of the Ohio Constitution . . . is coextensive with that of the Fourth Amendment.”¹³⁴

Analytical Framework: “[W]here the provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio’s Constitution are coextensive with those provided by the United States Constitution.”¹³⁵

Representative Departures:

- The only departure came when the Ohio Supreme Court rejected *Atwater v. City of Lago Vista*¹³⁶ as a matter of state constitutional law.¹³⁷

36. OKLAHOMA

Analogue: {OKLA. CONST. art. II, § 30} “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or

¹³⁴ *State v. Geraldo*, 429 N.E.2d 141, 145-46 (Ohio 1981) (quoted in *State v. Robinette*, 685 N.E.2d 762, 767 (Ohio 1997)).

¹³⁵ *Robinette*, 685 N.E.2d at 766 (citation omitted).

¹³⁶ *Atwater v. City of Lago Vista*, 532 U.S. 218 (2001).

¹³⁷ See *State v. Brown*, 792 N.E.2d 175, 178 (Ohio 2003).

affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.”

Interpretation: The Oklahoma Court of Criminal Appeals wrote:

As this Court has repeatedly noted, this provision of our State's Constitution is derived from the Fourth Amendment to the Federal Constitution. . . . While [we] reserve[] the right to interpret the particular guarantees of the Oklahoma Constitution, we find that the decisions of the United States Supreme Court regarding the Fourth Amendment to be highly persuasive and these decisions will guide our opinions regarding search and seizure.¹³⁸

United States Supreme Court opinions have been so persuasive that Oklahoma has not diverged from them in interpreting its constitution.

37. OREGON

Analog: {**OR. CONST. art. I, § 9**} “No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”

Interpretation: The Supreme Court of Oregon noted:

that there is no presumption that interpretations of the Fourth Amendment by the Supreme Court of the United States are correct interpretations of Article 1, section 9. . . . Article I, section 9, and the Fourth Amendment have a common source in the early state constitutions, but they have textual and substantive differences. Even were the provisions identical, this court would nonetheless be responsible for interpreting the state provision independently, though not necessarily differently. Majority opinions of the Supreme Court of the United States may be persuasive, but so may concurring and dissenting opinions of that court, opinions of other courts construing similar constitutional

¹³⁸ Dixon v. State, 737 P.2d 942, 945 (Okla. Crim. App. 1987).

provisions, or opinions of legal commentators. What is persuasive is the reasoning, not the fact that the opinion reaches a particular result.¹³⁹

Oregon recognizes that its analog protects privacy: "This court has often stated that 'privacy' is the interest protected by Article I, section 9, against unreasonable searches but has had little occasion to further define that interest."¹⁴⁰ Further, "the privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a right."¹⁴¹

Analytical Framework: In construing the Oregon Constitution generally, the Oregon Supreme Court seems to rely (though not exclusively) on this test: "There are three levels on which that constitutional provision must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation."¹⁴²

Representative Departures:

- The Oregon Constitution prohibits warrantless, suspicionless stops of automobiles;¹⁴³ and,
- Administration of field sobriety tests constitutes a warrantless "search" under the Oregon Constitution, but is a reasonable search if "conducted with probable cause and under exigent circumstances."¹⁴⁴

¹³⁹ State v. Campbell, 759 P.2d 1040, 1044 n.7 (Or. 1988) (citations omitted).

¹⁴⁰ *Id.* at 1043.

¹⁴¹ *Id.* at 1044 (rejecting *Katz v. United States*, 389 U.S. 347 (1967), and its reasonable expectation of privacy); see also State v. Nagel, 880 P.2d 451, 454 (Or. 1994) ("Unlike under the federal constitution, a search is not defined by a reasonable expectation of privacy, but in terms of the privacy to which one has a *right*." (quotation and citation omitted)).

¹⁴² *Priest v. Pearce*, 840 P.2d 65, 67 (Or. 1992) (en banc). Although Westlaw's Keycite feature indicates that *Priest* has been abrogated, the constitutional, *Analytical Framework* appears to be sound. See, e.g., *Billings v. Gates*, 916 P.2d 291, 295 (Or. 1996) (en banc) (citing *Priest* for the framework). For a thorough discussion of the frameworks the Oregon Supreme Court has, from time to time, employed, see Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 826-75 (2000).

¹⁴³ See *Nelson v. Lane County*, 743 P.2d 692, 694 (Or. 1987) ("A compelled stop of a person on a public road, of course, requires justification.").

¹⁴⁴ *Nagel*, 880 P.2d at 456.

38. PENNSYLVANIA

Analogue: {PA. CONST. art. I, § 8} “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.”

Interpretation: “Pennsylvania has a long and active history of independent enforcement of its state constitution.”¹⁴⁵ “In fact, our state Supreme Court has stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated.”¹⁴⁶

Analytical Framework: When asked to interpret its state constitution, the Pennsylvania Supreme Court counsels as follows:

[A]s a general rule it is important that litigants brief and analyze at least the following four factors: 1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; [and,] 4) policy considerations, including unique issues of state and local concern, and applicability with modern Pennsylvania jurisprudence.¹⁴⁷

Representative Departures:

- Individuals have a legitimate expectation of privacy in their bank records;¹⁴⁸
- Pennsylvania rejects the test articulated in *California v. Hodari D.*¹⁴⁹ to determine a physical seizure, opting instead for a totality of the circumstances test;¹⁵⁰ and,

¹⁴⁵ Jones v. City of Philadelphia, 890 A.2d 1188, 1193 (Pa. Commw. Ct. 2006) (quotation and citation omitted).

¹⁴⁶ *Id.* at 1193-94.

¹⁴⁷ Commonwealth v. Edmunds, 586 A.2d 887, 895, 895-905 (Pa. 1991) (proceeding to analyze using these four factors).

¹⁴⁸ See Commonwealth v. DeJohn, 403 A.2d 1238 (Pa. 1979) (rejecting United States v. Miller, 425 U.S. 435 (1976), as a matter of state constitutional law).

¹⁴⁹ 449 U.S. 904 (1981).

¹⁵⁰ 530 U.S. 90 (2000).

- Pennsylvania's analog contains no "good faith" exception.¹⁵¹

39. RHODE ISLAND

Analogue: {R.I. CONST. art. I, § 6} "The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized."

Interpretation: The Rhode Island Supreme Court noted "that although Supreme Court holdings controlled questions of federal constitutional law and established the minimum level of constitutional protection against unreasonable search and seizure, a state constitution may be interpreted to afford greater protection to citizens of that state."¹⁵²

Analytical Framework: "We have departed from these minimum standards [of the Fourth Amendment] only when we have determined that our guarantee against unreasonable searches and seizures requires greater protection."¹⁵³ The Rhode Island Supreme Court has relied, in the past, on (1) history of its state analog; (2) its case law; (3) sister states' case law; and, (4) public policy.¹⁵⁴

Representative Departures:

- "We therefore hold that roadblocks or checkpoints, established to apprehend persons violating the law against driving under the influence of intoxicating beverages or drugs, oper-

¹⁴⁹ 499 U.S. 621 (1991) (holding that an individual is not "seized" within meaning of Fourth Amendment when a police officer pursues him with intent to question him).

¹⁵⁰ See *Commonwealth v. Matos*, 672 A.2d 769, 774 (Pa. 1996) ("[A] person has been 'seized' . . . only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.").

¹⁵¹ *Edmunds*, 586 A.2d at 905-06.

¹⁵² *State v. Werner*, 615 A.2d 1010, 1012 (R.I. 1992) (abrogating a prior divergence and marching in-step with the United States Supreme Court hence).

¹⁵³ *Pimental v. Dep't of Transp.*, 561 A.2d 1348, 1350 (R.I. 1989)

¹⁵⁴ *Id.* at 1349-52 (considering, though not naming, those factors).

ate without probable cause or reasonable suspicion and violate the Rhode Island Constitution.”¹⁵⁵

40. SOUTH CAROLINA

Analogy: {S.C. CONST. art. I, § 10} “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.”

Interpretation: “[T]his Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution.”¹⁵⁶ The South Carolina Supreme Court continued:

Especially important in this analysis is South Carolina’s explicit right to privacy. . . . Initially, even in the absence of a specific right to privacy provision, this Court could interpret our state constitution as providing more protection than the federal counterpart. However, by articulating a specific prohibition against “unreasonable invasions of privacy,” the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence.¹⁵⁷

Analytical Framework: While not articulating a test (or set of factors), a review of the South Carolina Supreme Court’s *State v. Forrester*¹⁵⁸ opinion reveals that the Court used (and may again use): (1) sister states’ case law (especially those states with an explicit privacy provision¹⁵⁹); (2) the constitutional provision’s

¹⁵⁵ *Id.* at 1352.

¹⁵⁶ *State v. Forrester*, 541 S.E.2d 837, 841 (S.C. 2001).

¹⁵⁷ *Id.* at 840-41.

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; WASH. CONST. art. I, § 7.

ratification history; and, (3) a review of South Carolina case law.¹⁶⁰

41. SOUTH DAKOTA

Analogue: {S.D. CONST. art. VI, § 11} “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized.”

Interpretation: “At the outset, we note the language prohibiting unreasonable searches and seizures in our state constitution closely tracks the language of the Fourth Amendment. The similarity in language is not by itself dispositive, however, as this Court may interpret the South Dakota Constitution as providing greater protection to citizens of this state than is provided them under the federal Constitution as interpreted by the United States Supreme Court.”¹⁶¹

Analytical Framework: The South Dakota Supreme Court offers this proviso for those advocating state constitutional departures:

A bare disagreement with the United States Supreme Court’s interpretation of the Federal Constitution imparts no sound doctrinal basis to impose a contrary view under the pretext of separately interpreting our State Constitution. Our Constitution is more than just a device to reject or evade federal decisions. . . . Counsel advocating a separate constitutional interpretation must demonstrate that the text, history, or purpose of a South Dakota constitutional provision supports a different interpretation from the corresponding federal provision.¹⁶²

¹⁶⁰ See *Forrester*, 541 S.E.2d at 840-43.

¹⁶¹ *State v. Schwartz*, 689 N.W.2d 430, 435 (S.D. 2004) (citation omitted).

¹⁶² *State v. Kottman*, 707 N.W.2d 114, 119-20 (S.D. 2005) (quotation and citation omitted).

Representative Departures:

- “We now conclude that as a matter of protection under S.D. CONST. Art. VI, § 11, ‘minimal interference’ with a citizen’s constitutional rights means that noninvestigative police inventory searches of automobile without a warrant must be restricted to safeguarding those articles which are within plain view of the officer’s vision.”¹⁶³

42. TENNESSEE

Analog: {**TENN. CONST. art. I, § 7**} “That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.”

Interpretation: “[A]rticle I, section 7 is identical in intent and purpose with the Fourth Amendment, and . . . federal cases applying the Fourth Amendment should be regarded as particularly persuasive.”¹⁶⁴ Nevertheless, “we recognize, as we have in the past, that article I, section 7 may afford citizens of Tennessee even greater protection.”¹⁶⁵

Analytical Framework: The Tennessee Supreme Court has not articulated a test, but considered *inter alia* (1) federal precedent; (2) sister states’ precedent; and, (3) public policy, in determining whether to part company with the United States Supreme Court.¹⁶⁶

¹⁶³ State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976), *on remand from* South Dakota v. Opperman, 428 U.S. 364 (1976) (United States Supreme Court holding that conduct did not violate Fourth Amendment).

¹⁶⁴ State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (quotation and citations omitted).

¹⁶⁵ *Id.* at 106.

¹⁶⁶ *Id.* at 106-11.

Representative Departures:

- Sobriety checkpoint, not conducted “in accordance with pre-determined guidelines and supervisory authority that minimize the risk of arbitrary intrusions on individuals and limit the discretion of law enforcement officers at the scene,” violates the Tennessee Constitution;¹⁶⁷ and,
- Tennessee rejects the totality of the circumstances test articulated in *Illinois v. Gates*,¹⁶⁸ using instead the *Aguilar v. Texas*¹⁶⁹ and *Spinelli v. United States*¹⁷⁰ tests as a matter of state constitutional law.¹⁷¹

43. TEXAS

Analogue: {TEX. CONST. art. I, § 9} “The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.”

Interpretation: The Texas Court of Criminal Appeals “expressly conclude[d] that [it], when analyzing and interpreting Art. I, § 9, Tex. Const., will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue.”¹⁷²

Analytical Framework: To decide whether to depart company with the United States Supreme Court, the Texas Court of Criminal Appeals will consider: “the text of the [Texas] Constitution, refer to [its] prior decisions, consider the history of the common law, and consider Fourth Amendment jurisprudence.”¹⁷³

¹⁶⁷ *Id.* at 112.

¹⁶⁸ 462 U.S. 213 (1983).

¹⁶⁹ 378 U.S. 108 (1964).

¹⁷⁰ 393 U.S. 410 (1969).

¹⁷¹ *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989).

¹⁷² *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). While the court’s statement does not seem novel, determining whether to be in lock-step with the United States Supreme Court was the express purpose of the *Heitman* opinion, arrived at after a thorough analysis. *See id.* at 684-90.

¹⁷³ *Hulit v. State*, 982 S.W.2d 431, 435 (Tex. Crim. App. 1998) (declining to provide greater protection under the Texas Constitution).

Representative Departures: A review of the case law reveals no decision where Texas courts have exercised their authority to diverge.

44. UTAH

Analog: {UTAH CONST. art. I, § 14} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.”

Interpretation: “While this court’s interpretation of article I, section 14 has often paralleled the United States Supreme Court’s interpretation of the Fourth Amendment, we have stated that we will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state’s citizens.”¹⁷⁴

Analytical Framework: The Utah Supreme Court has not explicitly identified any factors. Nevertheless, it has considered: (1) federal precedent; (2) sister states’ precedent; and, (3) public policy.¹⁷⁵

Representative Departures:

- Under the Utah Constitution, opening a car door during warrantless search for vehicle identification number may constitute unreasonable search;¹⁷⁶ and,

¹⁷⁴ State v. DeBooy, 996 P.2d 546, 549 (Utah 2000). Utah’s decision to interpret its constitution independently is a recent one. See State v. Thompson, 810 P.2d 415, 416 (Utah 1991) (“Article I, section 14 of the Utah Constitution reads nearly verbatim with the fourth amendment, and thus this Court has never drawn any distinctions between the protections afforded by the respective constitutional provisions. Rather, the Court has always considered the protections afforded to be one and the same.”).

¹⁷⁵ See, e.g., Thompson, 810 P.2d at 416-18 (finding a reasonable expectation of privacy in depositor’s bank records).

¹⁷⁶ See State v. Larocco, 794 P.2d 460, 465-71 (Utah 1990) (plurality opinion). The precedential force of Larocco has been questioned. See State v. Giron, 943 P.2d 1114, 1121 (Utah Ct. App. 1997) (“Because Larocco was only a plurality opinion, its analysis is not binding.”); State v. Anderson, 910 P.2d 1229, 1234-35 n.5 (Utah 1996) (plurality opinion).

- “[S]uspicionless, investigatory, nonemergency checkpoints” may violate the Utah Constitution.¹⁷⁷

45. VERMONT

Analogy: {VT. CONST. ch. 1, art. 11} “That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.”

Interpretation: “We are a sovereign state, and this Court is entitled to take issue with any constitutional decision of the United States Supreme Court, regardless of whether our constitution provides the same or a different text. Like us, the Supreme Court hands down its decision on paper, not stone tablets.”¹⁷⁸ In another decision, the Vermont Supreme Court emphasized that its task was not to “merely honor words,” but to “discover and protect the core value” of privacy embraced by Article 11.¹⁷⁹

Analytical Framework: The Vermont Supreme Court employs this framework in considering questions of Vermont constitutional law: “(1) historical considerations; (2) the textual differences between [Article 11 and the Fourth Amendment]; (3) sibling state authority; and (4) policy considerations.”¹⁸⁰

As an aside, in 1985, the court issued a firm notice to its bar, advising them to brief state constitutional issues where implicat-

(“The plurality opinion in *Larocco* represents the views of only two justices of this court and is therefore not the law of this state.”). But see *DeBooy*, 996 P.2d at 549 (citing *Larocco* for proposition that Utah Constitution has provided greater privacy protection).

¹⁷⁷ See *DeBooy*, 996 P.2d at 554 n.11. It is unclear whether the Utah Supreme Court framed the holding under federal or state constitutional law. See *id.* at 554.

¹⁷⁸ *State v. Morris*, 680 A.2d 90, 101 (Vt. 1996).

¹⁷⁹ *State v. Kirchoff*, 587 A.2d 988, 991-92 (Vt. 1991) (finding reasonable expectation of privacy in posted, open fields).

¹⁸⁰ *State v. Rheume*, 853 A.2d 1259, 1264 (Vt. 2004) (describing general framework and then applying in the self-incrimination arena).

ed, else the court will order re-briefing.¹⁸¹ That opinion, *State v. Jewett*, contains Vermont's philosophy on independent state constitutional interpretation and, for that reason alone, is worth attention.¹⁸²

Representative Departures:

- The Vermont Supreme Court "will recognize a separate and higher expectation of privacy for containers used to transport personal possessions than for objects exposed to plain view within an automobile's interior;"¹⁸³
- "[A] defendant need only assert a possessory, proprietary or participatory interest in the item seized or the area searched to establish standing to assert an Article Eleven challenge;"¹⁸⁴ and,
- The Vermont Constitution protects one's privacy interest in their garbage, qualified as follows:

Although people have an interest in keeping the contents of their garbage bags private, they have no privacy or possessory interest in keeping the bags in any particular location. . . . Ordinarily, the *seizure* of trash bags would be permitted without a warrant given the exigency of the situation. . . . Once the police have seized the bags, however, they cannot search them before obtaining a warrant based on probable cause.¹⁸⁵

46. VIRGINIA

Analog: {VA. CONST. art. I, § 10} "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

¹⁸¹ See *State v. Jewett*, 500 A.2d 233 (Vt. 1985).

¹⁸² *Id.* at 233-39.

¹⁸³ *State v. Savva*, 616 A.2d 774, 781 (Vt. 1991) (holding officer should have obtained warrant to search closed paper sac in defendant's automobile).

¹⁸⁴ *State v. Wood*, 536 A.2d 902, 908 (Vt. 1987).

¹⁸⁵ *State v. Morris*, 680 A.2d 988, 100 (Vt. 1996).

Interpretation: “The Virginia requirements, under our constitution and the statutes implementing the constitutional provision, are substantially the same as those contained in the Fourth Amendment.”¹⁸⁶

47. WASHINGTON

Analog: {WASH. CONST. art. I, § 7} “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Interpretation: “It is now well settled that the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.”¹⁸⁷

Analytical Framework: The Washington Supreme Court has articulated six factors (termed “*Gunwall* factors”) to determine whether to interpret the state constitution independently.¹⁸⁸

The following nonexclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.¹⁸⁹

Representative Departures:

- “[D]ue to the explicit language of Const. art. 1, § 7, under the Washington Constitution the relevant inquiry for de-

¹⁸⁶ *Lowe v. Commonwealth*, 337 S.E.2d 273, 274 n.1 (Va. 1985) (quotation and citations omitted); see also *El-Amin v. Commonwealth*, 607 S.E.2d 115, 116 n.3 (Va. 2005) (“The rights El-Amin asserts under the Fourth Amendment are co-extensive with those rights afforded under Article 1, Section 10 of the Constitution of Virginia.”).

¹⁸⁷ *State v. McKinney*, 60 P.3d 46, 48 (Wash. 2002) (en banc).

¹⁸⁸ See *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986) (en banc).

¹⁸⁹ *Id.* at 811. For a thorough review of Washington search and seizure jurisprudence, see Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 SEATTLE U. L. REV. 467 (2005). The Honorable Charles W. Johnson is a Justice of the Supreme Court of Washington, whose comprehensive treatment reads more like an invaluable treatise than a law review article.

termining when a search has occurred is whether the state unreasonably intruded into the defendant's 'private affairs';¹⁹⁰

- The Washington Constitution "prevent[s] the defendant's long distance home telephone records from being obtained from the phone company, or a pen register from being installed on her telephone connections, without a search warrant or other appropriate legal process first being obtained";¹⁹¹ and,
- A defendant's "private affairs were unreasonably intruded upon by law enforcement officers when they removed the garbage of his trash can and transported it to the police station in order to make it available to state and federal narcotics agents."¹⁹² Such action was therefore unconstitutional under the Washington Constitution.

48. WEST VIRGINIA

Analog: {W. VA. CONST. art. III, § 6} "The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized."

Interpretation: "This Court has customarily interpreted Article III, § 6 of the West Virginia Constitution in harmony with federal case law construing the Fourth Amendment."¹⁹³

Indeed, the West Virginia Supreme Court does not seem to have broken that custom, as I was unable to locate reported cases where West Virginia has diverged.

49. WISCONSIN

Analog: {WIS. CONST. art. I, § 11} "The right of the people to be secure in their persons, houses, papers, and effects against un-

¹⁹⁰ State v. Myrick, 688 P.2d 151, 153-54 (Wash. 1984) (en banc) (rejecting Katz v. United States, 389 U.S. 347 (1967), test).

¹⁹¹ Gunwall, 720 P.2d at 813.

¹⁹² State v. Boland, 800 P.2d 1112, 1116 (Wash. 1990) (en banc).

¹⁹³ Rogers v. Albert, 541 S.E.2d 563, 569 (W. Va. 2000) (per curiam).

reasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

Interpretation: “Typically, this court interprets Article 1, Section 11 of the Wisconsin Constitution in tandem with the Fourth Amendment jurisprudence of the United States Supreme Court. . . . Of course, we do not always follow the Supreme Court’s lead. . . .”¹⁹⁴

50. WYOMING

Analog: {WYO. CONST. art. I, § 4} “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.”

Interpretation: “[O]ur approach to the search and seizure area usually has implied the reading of the state and federal constitutions together and treating the scope of the state provision as the same as that of the federal provision.”¹⁹⁵

Analytical Framework: The Wyoming Supreme Court, first in a concurrence and later in a majority opinion, accepted the Washington Supreme Court’s “*Gunwall* factors”¹⁹⁶ as particularly useful. They are: “(1) the textual language; (2) the differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.”¹⁹⁷

¹⁹⁴ State v. Young, 717 N.W.2d 729, 739-40 (Wis. 2006). In the search and seizure context, the Wisconsin Supreme Court has not taken a different path. See *id.* at 740 (citing only a state equal protection case for the proposition that Wisconsin does not always follow the United States Supreme Court’s lead).

¹⁹⁵ Callaway v. State, 954 P.2d 1365, 1370 (Wyo. 1998) (citation omitted).

¹⁹⁶ See *Gunwall*, 720 P.2d at 812.

¹⁹⁷ Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring) (“I recommend this analytical technique to our practicing bar.”).

Wyoming has the factors and an apparent willingness to consider an independent interpretation and, yet, has not diverged, save the one instance noted below.

Representative Departures:

- “The provision of the Wyoming Constitution covering search and seizure, being Article 1, § 4, is different than that of the United States Constitution and makes it mandatory that the search warrant be issued upon an affidavit.”¹⁹⁸

III. CONCLUSION

Forty years ago, Justice Brennan expressed the inherent value of state constitutionalism, as well as its larger value in our federal structure. He wrote:

State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.¹⁹⁹

To me, it's unclear whether Justice Brennan was prescient of, or causing, the state constitutionalism groundswell that many scholars have chronicled since the 1970s.²⁰⁰ I like to think both.

As a greenhorn, I leave it to scholars, researchers, and practitioners to provide answers to those, as well as other, questions of state constitutionalism. As part of that inquiry, though, I hope the learned find this survey useful.

¹⁹⁸ Smith v. State, 557 P.2d 130, 132 (Wyo. 1976).

¹⁹⁹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

²⁰⁰ See, e.g., Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2004).

The James Otis Lectures

ANNUAL LECTURE SERIES
ON SEARCH AND SEIZURE
PRINCIPLES



This lecture series is fittingly named after the man who not only ignited the American Revolution, but whose very words in opposition to the writs of assistance inspired the Fourth Amendment, James Otis.

Born in Great Marshes (now West Barnstable), Massachusetts, the eldest of thirteen children, Otis would devote his life to the law, as his father and grandfather had done before, becoming one of the most revered trial advocates and legal orators throughout Massachusetts, earning him the coveted position as Advocate General of the Vice-Admiralty Court at just thirty-one years of age, a position he would later resign to champion the cause against the Crown's arbitrary issuance of writs of assistance. The writs were general search warrants that permitted the authorities to search anywhere they pleased for any reason—or for no reason. In one of the first defiant stands against British authority in the Colonies, Otis attacked the writs as

“against the fundamental principles of law.”¹ He asserted, among other things: “A man’s house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.”²

John Adams, who witnessed Otis’s impassioned oration, afterward declared: “Every man of an [immense] crowded audience appeared to me to go away, as I did, ready to take arms against [Writs] of Assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”³

Although Otis may have lost his case before the Massachusetts Superior Court in Boston’s Old Town Hall that day, he gained a place in history. In that case, “the American tradition of constitutional hostility to general powers of search first found articulate expression.”⁴ It was Adams, so inspired by Otis’s words, who later drafted Article Fourteen of the Massachusetts Declaration of Rights of 1780, which served as the model for the Fourth Amendment.

Otis would become one of the greatest Patriots our country has ever known. Though eventually reduced to insanity and ultimately silenced by a bolt of lightning, James Otis will forever remain first among America’s Fourth Amendment advocates.

Thomas K. Clancy*

¹ TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 36-37 (1969) (quoting 2 LEGAL PAPERS OF JOHN ADAMS 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

² *Id.* at 37 (quoting 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 1, at 142).

³ 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 1, at 107.

⁴ M.H. SMITH, THE WRITS OF ASSISTANCE CASE 7 (1978).

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RIGHTS WITHOUT REMEDIES: THE COURT THAT CRIED “WOLF”

MORGAN CLOUD*

I. INTRODUCTION

When I first read the majority and dissenting opinions in *Hudson v. Michigan*,¹ a 5-4 decision issued in June 2006, I had the odd feeling that I had read this opinion before—not just that the Justices were revisiting recurring and fundamental constitutional issues, but that I had read *these opinions* before. And I had. Because in *Hudson*, the Justices resurrected arguments seemingly settled in a series of opinions issued between 1949 and 1961.²

All of these cases involved the same set of rights—those protected by the Fourth Amendment. Those rights were recognized as fundamental by the founding generations in the eighteenth century and were imposed on the states as fundamental rights protected by the Due Process Clause of the Fourteenth Amendment in the Court’s 1949 decision in *Wolf v. Colorado*.³ In *Wolf*, the dispute among the Justices was whether due process also required that the states enforce the exclusionary rule that the Court had applied in federal cases for decades.⁴ The majority’s answer in *Wolf* was “no.” The exclusionary rule was

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¹ 126 S. Ct. 2159 (2006).

² Writing for three of the dissenters in *Hudson*, Justice Breyer noted that the majority’s arguments had resurrected *Wolf*. See, e.g., 126 S. Ct. at 2175 (Breyer, J., dissenting) (“To argue, as the majority does, that new remedies, such as 42 U.S.C. § 1983 actions or better trained police, make suppression unnecessary is to argue that *Wolf*, not *Mapp*, is now the law.”).

³ 338 U.S. 25, 33 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴ See *Boyd v. United States*, 116 U.S. 616 (1886) (implicitly announcing an exclusionary rule); *Weeks v. United States*, 232 U.S. 383 (1914) (announcing an explicit exclusionary rule).

not an essential part of due process rights, and the states were free to ignore it.

That conclusion was reaffirmed only five years later in a long-forgotten case, *Irvine v. California*.⁵ *Irvine* was Earl Warren's first Fourth Amendment case as the new Chief Justice of the United States, and in it he joined the majority in rejecting the claim that the states *must* adopt the exclusionary rule as one of the remedies available to those claiming that their Fourth Amendment rights had been violated. As we will see, despite its anonymity *Irvine* had a critical impact upon the development of Earl Warren's views about the need for constitutional judicial review.

Wolf and *Irvine* were overruled in 1961 by the Court's seminal decision in *Mapp v. Ohio*,⁶ which required the states to employ the Fourth Amendment exclusionary rule. In recent decades, a series of Supreme Court opinions has redefined the suppression remedy's purpose and limited its impact.⁷ Those opinions generally have focused upon the remedy's scope and application in particular settings, and not upon its survival in constitutional doctrine.

This explains why Justice Scalia's majority opinion in *Hudson* is so striking. It resurrects arguments questioning the very legitimacy of the exclusionary rule employed by opponents of suppression half a century ago. Although the narrow issue in *Hudson* was whether violation of the knock-and-announce rule should trigger the exclusionary rule, the majority and dissenting opinions crossed swords over the more fundamental issue of the exclusionary rule's continued viability. Ultimately the question they debated was nothing less than the future of constitutional judicial review of searches and seizures conducted by executive branch actors.

That issue is the subject of this paper. Part II discusses *Hudson*'s provocative dicta questioning the efficacy of the exclusionary rule. In Part III, I examine the theories employed in the

⁵ 347 U.S. 128 (1954).

⁶ 367 U.S. 643 (1961).

⁷ *United States v. Leon*, 468 U.S. 897, 916-20 (1984); *United States v. Calandra*, 414 U.S. 338, 347-58 (1974).

seminal early opinions that established the remedy in federal cases. Part IV reviews the arguments made during the mid-twentieth century in *Wolf* and *Mapp*, arguments revisited only last year in *Hudson*. This discussion includes an analysis of the relationship between the exclusionary rule and the broader issue of constitutional judicial review articulated in the Supreme Court's original opinions imposing that remedy in both federal and state court litigation.

The final section examines the *Irvine* case, and explains how it affected Chief Justice Warren's views about the need for the exclusionary rule in search and seizure cases. I conclude that the factors that influenced Chief Justice Warren's conversion on these issues provide a provocative example of why the exclusionary rule is an essential element of constitutional judicial review of police practices. The majority opinion in *Hudson v. Michigan*⁸ articulated a very different view of Fourth Amendment rights and remedies.

II. HUDSON

The constitutional question in *Hudson* was "whether violation of the 'knock-and-announce' rule requires the suppression of all evidence found in the search."⁹ Police officers went to Booker Hudson's home to execute a search warrant and announced their presence before entering.¹⁰ Up until this point, no one could question the legality of their conduct. That question was raised by what happened next: the officers waited only "three to five seconds" before entering Hudson's home, where they found drugs, including cocaine rocks in Hudson's pocket, and a loaded gun in the chair where Hudson was sitting.¹¹ Hudson was charged with unlawful drug and firearm possession.¹² The state trial court granted Hudson's motion to suppress all the evidence, finding that the premature entry violated

⁸ 126 S. Ct. 2159 (2006).

⁹ *Id.* at 2162.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

his Fourth Amendment rights, but the Michigan appellate courts reversed, and Hudson was convicted of drug possession.¹³

Justice Scalia's majority opinion reaffirmed the Court's recent knock-and-announce jurisprudence, which had held that the "common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is . . . a command of the Fourth Amendment."¹⁴ This line of decisions had, however, construed the common law rule as only a weak constraint on the police. Most importantly, officers need not knock and announce their presence if they possess reasonable suspicion to believe that to do so would expose them to the "threat of physical violence,"¹⁵ or "that evidence would likely be destroyed"¹⁶ or suspects would escape if "notice were given,"¹⁷ or that the exercise would be "futile."¹⁸

Applying this reasonableness approach, the Court had held that officers must wait only a reasonable time after knocking and announcing before entering a building.¹⁹ In *Hudson*, the State conceded that the officers had violated the knock-and-announce rule by waiting only three to five seconds. The issue in the Supreme Court was whether that violation triggered the exclusionary rule. Employing a balancing methodology, the majority concluded that "the social costs of applying the exclusionary rule to knock-and-announce violations are considerable,"²⁰ while suppression for such a violation offers little deterrence to police misconduct, particularly when compared to other mechanisms for achieving that goal.²¹ Given the majority's characteri-

¹³ *Id.*

¹⁴ *Id.* (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

¹⁵ *Richards v. Wisconsin*, 520 U.S. 385, 391 (1999).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 394.

¹⁹ *United States v. Banks*, 540 U.S. 31, 41 (2003) (concluding that police officers acted reasonably by waiting only 15-20 seconds after knocking before entering).

²⁰ *Hudson*, 126 S. Ct. at 2168.

²¹ The interests protected by the knock-and-announce rule also offered little support to *Hudson*. See, e.g., *id.* at 2165:

The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.

zation of the costs as “considerable” and the benefits as negligible, its conclusion that the “remedy of suppressing evidence of guilt is unjustified”²² was inevitable.²³

One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who “did not know of the process, of which, if he had notice, it is to be presumed that he would obey it” The knock-and-announce rule gives individuals “the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.” And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the “opportunity to prepare themselves for” the entry of the police. “The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.” In other words, it assures the opportunity to collect oneself before answering the door.

What the knock-and-announce rule has never protected, however, is one’s interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

Id. (citations omitted).

²² *Id.* at 2168.

²³ Perhaps the oddest part of the opinion consisted of a discussion of precedents concerning the fruit of the poisonous tree doctrine. Justice Scalia accurately noted that the doctrine focused upon the relationship between government illegality and the discovery of evidence, then tried to bolster application of that rule in the knock-and-announce context by turning to older cases. He wrote:

For this reason, cases excluding the fruits of unlawful warrantless searches, see, e.g., *Boyd v. United States*; *Weeks*; *Silverthorne Lumber Co. v. United States*; [and] *Mapp*, say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement.

Id. at 2165 (citations omitted).

This statement is accurate but virtually meaningless in a judicial system in which cases are decided on their own facts and issues. None of those opinions mention knock-and-announce violations because the issue was *entirely irrelevant* to each. The Boyds complied with a judicial subpoena by bringing the requested business papers to court. The facts of *Weeks* did not raise the issue, because officers conducted an unconstitutional warrantless search of Weeks’s home while he was away. *Weeks v. United States*, 232 U.S. 383, 387-89 (1914). In *Silverthorne*, the owners of a lumber company refused to comply with a subpoena for business records. *Silverthorne Lumber Co. v. United States*, 252 U.S. 385, 390-92 (1920). Later, government agents acting without a warrant or other legal authority went to the business, searched it, and seized business papers. *Id.* at 390-91. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the officers exceeded any possible requirements of the knock-and-announce rule. They alerted Mapp from outside the home, and when she refused to consent to an entry, they waited hours for a warrant. *Id.* at 644-45. Again, the violation was a forcible warrantless search and seizure with a home. In short, had these famous opinions commented on the relationship between the

What was not inevitable was the inclusion of dicta questioning not only the costs of exclusion, but also the continued need for the exclusionary remedy. The discussion of the costs of exclusion was encompassed within the balancing methodology that has become conventional in recent decades.²⁴ After acknowledging that the Court had previously applied the exclusionary rule expansively,²⁵ Scalia's opinion asserted that suppression "has always been our last resort, not our first impulse"²⁶ because of the "substantial social costs" resulting from this remedy. The ultimate cost was, as it had been over half a century earlier in *Wolf*, that criminals would go free because the police had erred.²⁷

This indisputable shortcoming of the exclusionary rule—that it offers aid only when incriminating evidence has been found—is neither original nor unusual in the Supreme Court's opinions construing the scope of its application. Subsequent passages went further, disputing the idea that exclusion remains necessary for deterrence of police illegality. The opinion argued first that changes in the application of 42 U.S.C. § 1983 made suits for civil damages an adequate remedy.²⁸

knock-and-announce rule and suppression of evidence, this would have been ill-advised and irrelevant dicta.

²⁴ *United States v. Leon*, 468 U.S. 897 (1984). See also, Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 226-47 (1993).

²⁵ *Hudson*, 126 S.Ct. at 2163 (quoting *Mapp*, 367 U.S. at 655 ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.")).

²⁶ *Id.* Citing earlier decisions, the majority recognized that at one time the Supreme Court had equated "a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation." *Id.* at 2164. It stressed however, that subsequent decisions had rejected this approach. *Id.* (quoting *Arizona v. Evans*, 514 U.S. 1, 13 (1995)).

²⁷ 126 S.Ct. at 2166.

²⁸ *Id.* In his dissenting opinion, Justice Breyer disputed this claim. See *id.* at 2175 (Breyer, J., dissenting):

To argue that there may be few civil suits because violations may produce nothing "more than nominal injury" is to confirm, not to deny, the inability of civil suits to deter violations. And to argue without evidence (and despite myriad reported cases of violations, no reported case of civil damages, and Michigan's concession of their nonexistence) that civil suits may provide deterrence because claims *may* "have been settled" is, perhaps, to search in desperation for an argument. Rather, the majority, as it candidly admits, has simply "assumed" that, "[as] far as [it] know[s], civil liability is an effective deterrent," a

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief; *Monroe v. Pape*, 365 U.S. 167 (1961), which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities, *Monell v. Department of Social Services*. Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens v. Six Unknown Federal Narcotics Agents*.

Hudson complains that "it would be very hard to find a lawyer to take a case such as this," but 42 U.S.C. § 1988(b) answers this objection. Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp*, "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.²⁹

No reasonable observer would dispute that § 1983 litigation has expanded in recent decades, in part due to the Supreme Court decisions cited by Justice Scalia. Whether these changes are sufficient to serve as an adequate Fourth Amendment remedy is far less certain than Justice Scalia suggests.³⁰ Concerns

support-free assumption that *Mapp* and subsequent cases make clear does not embody the Court's normal approach to difficult questions of Fourth Amendment law.

²⁹ *Id.* at 2167.

³⁰ Writing in dissent, Justice Breyer raised these questions. *Id.* at 2174-75 (Breyer, J., dissenting):

about the objectivity of that conclusion can only be heightened by Justice Scalia's next argument.

Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to "assume" that unlawful police behavior would "be dealt with appropriately" by the authorities, but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been "wide-ranging reforms in the education, training, and supervision of police officers." Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect. There

Why is application of the exclusionary rule any the less necessary here? Without such a rule, as in *Mapp*, police know that they can ignore the Constitution's requirements without risking suppression of evidence discovered after an unreasonable entry. As in *Mapp*, some government officers will find it easier, or believe it less risky, to proceed with what they consider a necessary search immediately and without the requisite constitutional (say, warrant or knock-and-announce) compliance.

Of course, the State or the Federal Government may provide alternative remedies for knock-and-announce violations. But that circumstance was true of *Mapp* as well. What reason is there to believe that those remedies (such as private damages actions under 42 U.S.C. § 1983), which the Court found inadequate in *Mapp*, can adequately deter unconstitutional police behavior here?

The cases reporting knock-and-announce violations are legion. Yet the majority, like Michigan and the United States, has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation. Even Michigan concedes that, "in cases like the present one . . . , damages may be virtually non-existent."

As Justice Stewart, the author of a number of significant Fourth Amendment opinions, explained, the deterrent effect of damage actions "can hardly be said to be great," as such actions are "expensive, time-consuming, not readily available, and rarely successful."

Id. (citations omitted).

is also evidence that the increasing use of various forms of citizen review can enhance police accountability.³¹

Once again, no reasonable observer would dispute that police departments in this country are more professional today than they were half a century ago; or that their training has improved over the past half century. Many observers also would conclude, however, that the Supreme Court's decisions imposing the Fourth and Fifth Amendment exclusionary rules on all law enforcement officials were irreplaceable catalysts for these improvements.

Justice Scalia's reliance upon police department training to deter constitutional rights violations will strike some readers as particularly ironic. In recent years, evidence has emerged that some police departments have trained officers how to exploit recent Supreme Court decisions—including some in which Justices in the *Hudson* majority participated—in order to avoid constitutional restraints without triggering exclusion of the evidence improperly obtained.³² In the one Supreme Court case Scalia cites in this passage, *United States v. Payner*, federal agents intentionally violated the Fourth Amendment rights of one person to obtain evidence to use against another.³³

Four Justices dissented in *Hudson*. Writing for three of them, Justice Breyer lamented that the majority opinion “destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement.”³⁴ The Court's decisions imposing the Fourth Amendment exclusionary rule established that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible’ [and to hold otherwise] would be ‘to grant the right but in reality to withhold its privilege and enjoyment.’”³⁵ The next two Parts of this article examine those decisions and their com-

³¹ *Id.* at 2168 (citations omitted).

³² See, e.g., *Missouri v. Seibert*, 542 U.S. 600 (2004) (police officers trained to avoid interrogation rules articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966)). See also, *Seibert*, 542 U.S. at 611 n.2 (discussing other examples in which police officers were trained to evade *Miranda*'s restrictions).

³³ 447 U.S. 727 (1980) (cited at *Hudson*, 126 S.Ct. at 2168).

³⁴ *Hudson*, 126 S.Ct. at 2171.

³⁵ *Id.* at 2173

plex views about the nature, scope, and necessity of the exclusionary remedy.

III. THE ORIGINAL RATIONALE FOR THE EXCLUSIONARY RULE

A. Constitutional Judicial Review

Those familiar with contemporary Supreme Court decisions would be justified in assuming that deterring police misconduct is the sole justification for imposing the exclusionary remedy. But the deterrence rationale that prevails in recent opinions became central to the Supreme Court's analysis only in the latter decades of the twentieth century. It was not until the 1970s and 1980s that a series of opinions would hold that deterrence was the sole justification for suppressing evidence, and this was a rationale employed not to explain the rule, but to serve as a device for limiting its application.³⁶

Conversely, the Court's seminal opinions imposing the exclusionary remedy on the federal government (*Boyd v. United States*³⁷ and *Weeks v. United States*³⁸) and upon the states (*Mapp v. Ohio*³⁹) treated the rule as a form of constitutional judicial review deployed in the search and seizure context. In each of these opinions, the central objective was to craft a judicially enforceable remedy that judges could employ when government agents violated the rights of individuals. Deterring police misconduct was a peripheral concern. Just how far the Court's current doctrine has drifted from the original justifications for the exclusionary rule is apparent from an analysis of the opinions adopting the rule.

The early opinions' first and primary justification for adopting the exclusionary rule was to enforce individual rights. These opinions treated Fourth Amendment rights as essential constitutional privileges that helped define the very nature of the relationship between citizens and their government. They focused upon the nature and scope of privacy, property, and lib-

³⁶ See *United States v. Calandra*, 414 U.S. 338, at 347 (1974).

³⁷ 116 U.S. 616 (1886).

³⁸ 232 U.S. 383, 392 (1914).

³⁹ 367 U.S. 643, 660 (1961).

erty rights; upon the means of enforcing those rights for the individual claimant; and rarely even mentioned the deterrence of police misconduct as a rationale for exclusion.

Second, the exclusionary remedy permitted constitutional judicial review in the criminal prosecutions over which judges presided.⁴⁰ Other available remedies required separate proceedings, and typically would be directed at police officers who were not parties to the criminal case between government and citizens. A classic example was the trespass suit seeking civil damages. This remedy was available only if the civil claimant, typically the defendant in the criminal case, maintained separate judicial proceedings in which the named defendants usually would be police officers. Suppressing illegally obtained evidence, on the other hand, was a remedy that judges controlled. They could apply the remedy within the context of cases being litigated before them without being dependent upon the actions of other private litigants or branches of government, who were gatekeepers for the use of other possible remedies.

Third, these early opinions emphasized that judges were charged specifically with the duty of preserving individual rights from improper encroachment by government action. Judicial review was not just another remedy, it was an essential mechanism for preserving democratic liberties. And the exclusionary rule was the mechanism that implemented constitutional judicial review in the Fourth Amendment context.

The first great Supreme Court opinion interpreting the Fourth Amendment employed this vigorous theory of constitutional judicial review to enforce strong individual rights at the expense of efficient law enforcement.

⁴⁰ This rationale is consistent with the premise underlying the famous passage in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803): “[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.” *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *109).

B. Boyd, Rights, and Judicial Review

The Supreme Court laid the groundwork for a Fourth Amendment exclusionary rule in *Boyd v. United States*,⁴¹ where it held that a subpoena ordering a business to produce shipping invoices and other commercial papers violated the Fourth Amendment.⁴² The Boyds complied with the subpoena under protest, and delivered papers containing information that the government used in a civil forfeiture action to secure title to plate glass the Boyds had imported without paying federal import duties.⁴³ The controlling statute also authorized a federal criminal prosecution for this violation of tax laws, but government lawyers eschewed that tactic.⁴⁴ The Supreme Court held that the federal statute compelling production of these records and permitting the government to use their contents in both civil and criminal proceedings violated both the Fourth and Fifth Amendments.⁴⁵

Although the Supreme Court did not describe its opinion in terms of the exclusionary rule, the decision was an implicit suppression order. It prevented the government from using the documents or their contents as evidence in a judicial proceeding.⁴⁶

The constitutional theories supporting the *Boyd* decision and the Court's contemporary exclusionary rule opinions are strikingly different. The *Boyd* Court did not focus upon deterrence of police misconduct. Instead, it emphasized the rights protected by the Fourth and Fifth Amendments and the judicial duty to enforce rights against even the mildest forms of overreaching by the executive and legislative branches.⁴⁷ The Court acknowledged that the subpoena used to obtain the Boyds' pri-

⁴¹ 116 U.S. 616 (1886).

⁴² *Id.* at 638.

⁴³ *Id.* at 618.

⁴⁴ *See id.* at 618-19. *See also*, Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 573-81 (1996).

⁴⁵ *Boyd*, 116 U.S. at 638.

⁴⁶ *See id.* at 638.

⁴⁷ *See id.* at 625-27.

vate papers was not a literal search and seizure.⁴⁸ Nonetheless, the Justices enforced what today would be called a right to privacy in the papers and their contents.⁴⁹

An even greater difference appears in the conception of rights expressed in the two eras. Contemporary theory treats Fourth Amendment rights as mere interests that must be balanced against the competing government and social interests when deciding whether to exclude evidence because of government conduct—or misconduct. In contrast, the *Boyd* Court characterized these rights not just as fundamental but as infeasible, and emphasized judges' responsibility in our constitutional system to protect these rights against even the most modest and well-intended government intrusions.

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. . . . We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.⁵⁰

⁴⁸ See *id.* at 624, 630.

⁴⁹ *Boyd* was decided four years before publication of the influential law review article that labeled issues previously defined in terms of property and liberty rights, including the protection of private papers and their contents, as issues of "privacy." See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁵⁰ *Boyd*, 116 U.S. at 635.

The Court emphasized that its inquiry focused upon the question of whether use of illegally seized evidence was an independent violation of the Fourth Amendment, and it is this analysis that forms the basis for the exclusionary rule adopted explicitly twenty-eight years later in *Weeks*:

The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an “unreasonable search and seizure” within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding?⁵¹

The Court's answer in *Boyd* was clear: the use of unconstitutionally seized evidence against a citizen violated his constitutional rights.

C. Weeks and the Exclusionary Rule

In *Boyd*, the Supreme Court implicitly excluded evidence from use in a judicial proceeding. Nearly thirty years later, the Court relied upon *Boyd* to explicitly impose an exclusionary remedy. In *Weeks v. United States*,⁵² federal officers carried out a warrantless search of Weeks' home and found evidence, including papers, implicating Weeks in an illegal gambling business—the numbers racket.⁵³ Weeks filed motions seeking the return of all of the property.

The Supreme Court agreed that both the warrantless search of his home and seizure of his property were unconstitutional.⁵⁴ In explaining why the exclusionary remedy should be applied, the Court quoted from earlier opinions, including *Boyd* and *Entick v. Carrington*, a pre-Revolutionary English case cited extensively in *Boyd*. The *Weeks* opinion ultimately rested upon a view of individual rights and the constitutional duty im-

⁵¹ *Id.* at 622.

⁵² 232 U.S. 383 (1914).

⁵³ *Id.* at 386.

⁵⁴ *Id.* at 398.

posed on judges to enforce them that was entirely consistent with *Boyd*. In particular, judges were required to enforce Fourth Amendment rights and this in turn required them to exclude illegally seized evidence.

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.⁵⁵

As it had in *Boyd*, the Supreme Court treated the individual rights articulated in the Fourth Amendment as robust enough to trump arguments for efficient law enforcement and viewed the judiciary as the branch of government particularly charged with the duty of enforcing these fundamental rights against law enforcement efforts that would diminish them. And as in *Boyd*, the Court held that the Fourth Amendment precluded the federal government from using property, particularly papers and their contents, in judicial proceedings against the citizen whose rights were violated by the search and seizure that produced the evidence.⁵⁶

⁵⁵ *Id.* at 391-92.

⁵⁶ *See, e.g., id.* at 393-94.

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as

The Court rejected unequivocally the argument that remedies for violations of the Fourth Amendment were aimed at the investigating officers. Referring to the officers who carried out the illegal intrusions, the Supreme Court emphasized that "[w]hat remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies."⁵⁷

The *Boyd* Court distinguished between the constitutional remedy available to the defendant in a criminal prosecution whose rights had been *violated by the government*, and the common law trespass action for damages that might *also be available* against the individual searchers.⁵⁸ This passage presages arguments made decades later by the *Mapp* majority: the exclusionary rule is essential because it is the mechanism available to judges exercising judicial review for enforcing Fourth Amendment rights.⁵⁹ In the context of a criminal case brought by the government against a citizen, judges must craft remedies appropriate to that dispute, and excluding evidence is the one mechanism judges can apply independent of the judgment of executive branch actors or civil juries. In *Boyd* and *Weeks*, this conclusion was buttressed by the fact that no one disputed that the Fourth Amendment, and the rest of the Bill of Rights, existed to limit the power of the national government.⁶⁰ Employing constitutional judicial review to limit the power of state government actors was more difficult and more controversial.

well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

⁵⁷ *Id.* at 398 (emphasis added) (citing *Twining v. New Jersey*, 211 U.S. 78 (1908), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Boyd v. United States*, 116 U.S. 616 (1886)).

⁵⁸ *Boyd*, 116 U.S. at 662.

⁵⁹ *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

⁶⁰ *See, e.g., Barron v. Baltimore*, 32 U.S. 243, 248 (1833).

IV. THE EXCLUSIONARY RULE AND THE STATES

For almost half a century following *Weeks*, the Supreme Court did not impose this Fourth Amendment exclusionary rule upon the states. As the opinion in *Wolf* made clear, the traditional approach to interpreting the relationship between the Fourteenth Amendment's Due Process Clause and the rights protected by the Bill of Rights⁶¹ was a barrier to applying the blanket Fourth Amendment exclusionary rule to investigations and prosecutions conducted under state law.

A. *Wolf and Alternative Remedies*

Julius Wolf was a doctor in Denver, Colorado.⁶² He and a co-defendant were prosecuted in 1944 for conspiring to perform an illegal abortion on a specific patient.⁶³ At trial the prosecution offered Dr. Wolf's appointment book as an exhibit.⁶⁴ Wolf moved to suppress the appointment book because police had seized it without a warrant in violation of the Colorado constitution's analogue to the Fourth Amendment.⁶⁵ The trial judge

⁶¹ During the first half of the twentieth century, the Court employed a "fundamental fairness" theory to interpret the limits the Due Process Clause imposed on the states. According to this theory, only those rights deemed fundamental were imposed as part of due process, and the fact that a right was listed in the Bill of Rights did not mean that it was fundamental for these purposes. Conversely, a right might be deemed fundamental yet not appear in the Bill of Rights. In the criminal justice context, for example, the Court employed this approach in defining the right to have counsel for the defense in criminal cases: *Powell v. Alabama*, 287 U.S. 45, 73 (1932); *Betts v. Brady*, 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963); the right not to be subjected to double jeopardy: *Palko v. Connecticut*, 302 U.S. 319, 323-24 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969); and the right to be free from unreasonable searches and seizures: *Wolf v. Colorado*, 338 U.S. 25, 32 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961). This approach required that the Court examine the specific facts of each case to see if the right asserted by that defendant in that case was so fundamental to the nature of a free society that actions by a state derogating the right violated the very notion of ordered liberty. If it did not, then the state action did not violate due process, even if similar conduct by the federal government would violate some provision of the Bill of Rights. The Court's fact-sensitive, case-by-case approach methodology precluded imposition of global rules, like those adopted in *Weeks* and *Mapp*. As a result, many state actions survived constitutional scrutiny, and this theory tended, as a practical matter, to cede authority to the states.

⁶² *Wolf v. State*, 187 P.2d 926, 927 (Colo. 1947).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

denied the motion and admitted the book in evidence.⁶⁶ Dr. Wolf was convicted and sentenced to up to five years in prison.⁶⁷

Justice Frankfurter's majority opinion in *Wolf v. Colorado*⁶⁸ addressed the following question:

Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States*, 232 U.S. 383?⁶⁹

The five-Justice majority's answer was no. It held "that in a prosecution in a State court for a State crime the Fourteenth Amendment does *not* forbid the admission of evidence obtained by an unreasonable search and seizure."⁷⁰ Applying the fundamental fairness theory, Justice Frankfurter's opinion rejected the argument that the Fourteenth Amendment Due Process Clause incorporated "the specific requirements and restrictions placed by the Bill of Rights (Amendments I to VIII) upon the administration of criminal justice by federal authority . . ."⁷¹

According to the fundamental fairness approach, due process protected all fundamental rights, regardless of their inclusion in the Constitution's text.⁷² Freedom from unreasonable

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 338 U.S. 25 (1949).

⁶⁹ *Id.* at 25-26.

⁷⁰ *Id.* at 33 (emphasis added).

⁷¹ *Id.* at 26. Not surprisingly Frankfurter disparaged the "total incorporation" theories advocated by Justices Black and Douglas. ("The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight Amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See, e.g., *Hurtado v. California*, 110 U.S. 516; *Twining v. New Jersey*, 211 U.S. 78; *Brown v. Mississippi*, 297 U.S. 278; *Palko v. Connecticut*, 302 U.S. 319."). Frankfurter relied heavily on Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937) in holding that the Due Process Clause required the States to honor only those rights "implicit in the concept of ordered liberty." *Id.* 325.

⁷² *Wolf*, 338 U.S. at 27.

searches and seizures was such a fundamental right, but not because it is protected by the Fourth Amendment.

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.⁷³

This conclusion did not mean, however, that the federal exclusionary rule also was binding on the states. The majority argued, as would later critics, that the rule derived not from the text of the Constitution, but was merely the product of judicial decision making:

In *Weeks v. United States*, . . . this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was . . . not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.⁷⁴

Noting that most of the English speaking countries and about two-thirds of the states did not enforce an exclusionary remedy,⁷⁵ Justice Frankfurter argued that remedies other than suppression not only were adequate to protect against unreasonable government searches and seizures, they had a critical advantage: "the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found."⁷⁶ The guilty and

⁷³ *Id.* at 27-28.

⁷⁴ *Id.*

⁷⁵ *Id.* at 28-29.

⁷⁶ *Id.* at 30-31.

innocent alike, he argued, were protected by "remedies of private action [and] the internal discipline of the police, under the eyes of an alert public opinion"⁷⁷

Among these alternatives were the civil trespass suit for damages, prosecution for criminal trespass, and administrative sanctions against the searching officers. Justice Murphy's dissent challenged the efficacy of these other remedies in terms echoed by supporters of the exclusionary rule for more than half a century. Murphy agreed "that the Fourteenth Amendment prohibits activities which are proscribed by the search and seizure clause of the Fourth Amendment,"⁷⁸ but reached a very different conclusion about the alternative remedies.

Murphy disputed the efficacy of each of the alternatives to suppression cited by the majority.⁷⁹ Prosecutors were unlikely to prosecute law enforcers except in the most extreme cases, particularly if their offices were involved in the investigations.⁸⁰ Civil damages actions for trespass were an "illusory remedy" because they were unlikely to succeed in any meaningful way.⁸¹ Officers and governments might be protected by immunity; unless physical damages were extreme, damages awards would be too nominal to justify the costs of litigation.⁸² The officers' good faith in conducting the search and seizure was a defense, and jurors were more likely to be sympathetic to the law enforcers' subjective motives.⁸³ Punitive damages might be available if actual damage to property occurred, but state rules limiting how damages could be calculated reduced the value of this remedy.⁸⁴ All of these barriers are increased because the criminal plaintiffs' "bad reputation" would sway the jury.⁸⁵ Finally, "even if the plaintiff hurdles all these obstacles, and gains a

⁷⁷ *Id.* at 31.

⁷⁸ *Id.* at 41 (Murphy, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

substantial verdict, the individual officer's finances may well make the judgment useless"⁸⁶

Only the exclusionary rule was a reliable remedy. It warrants comment here that unlike the earlier pro-exclusion arguments in *Boyd* and *Weeks*, Justice Murphy described the comparative advantage of the exclusionary remedy not in terms of strong individual rights but in terms of the capacity to deter government misconduct. In this sense, he anticipated the rationale for exclusion adopted two decades later.

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.⁸⁷

Nonetheless, Murphy cited *Weeks* to emphasize the judiciary's special role in protecting against unreasonable searches and seizures, because "without judicial action, there are simply no effective sanctions presently available."⁸⁸ Murphy's arguments did not carry the day. A contrary view of remedies prevailed; the majority in *Wolf* concluded that states were free to employ other remedies instead of suppressing illegally seized evidence.⁸⁹ In response, Murphy discussed one example eerily prescient of the facts of the case that would overrule *Wolf* twelve years later:

In Cleveland, recruits and other officers are told of the rules of search and seizure, but "instructed that it is admissible in the courts of Ohio. The Ohio Supreme Court has indicated very definitely and clearly that Ohio belongs to the 'admission-

⁸⁶ *Id.* at 44.

⁸⁷ *Id.*

⁸⁸ *Id.* at 46.

⁸⁹ *Id.* at 33.

ist' group of states when evidence obtained by an illegal search is presented to the court."⁹⁰

B. Mapp and the Exclusionary Rule

In 1957, Cleveland police officers relied upon this Ohio rule when they illegally entered Dollree Mapp's apartment. When officers initially sought entry into the building, Mapp demanded that they produce a search warrant.⁹¹ After waiting fruitlessly for hours while a young officer went to obtain a warrant, the officers forced their way into the house where Mapp rented a second floor apartment.⁹² Although they were searching for a suspect in a bombing, the officers rummaged through Mapp's possessions including dresser drawers, and then searched her storage area in the home's basement.⁹³ They did not find the suspected bomber (he was hiding in another apartment in the building),⁹⁴ but they did find sexually explicit pictures and writings.⁹⁵ Mapp was convicted of possessing obscene materials. State and federal judges hearing the case assumed that the police did not have a warrant; this assumption was correct.⁹⁶ They also concluded that this warrantless physical invasion of Mapp's home violated her right to be free from unreasonable searches and seizures protected by both the federal and state constitutions.⁹⁷

Applying *Wolf*, the Ohio Supreme Court concluded that because the state had not adopted the exclusionary rule, admission of the illegally seized evidence violated neither the state constitution nor Fourteenth Amendment due process.⁹⁸ In a five-to-four decision, the United States Supreme Court reversed,

⁹⁰ *Id.* at 46.

⁹¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁹² *Id.*

⁹³ *Id.* at 644-45.

⁹⁴ *See, e.g.*, FRED W. FRIENDLY & MARTHA J.H. ELLIOT, *THE CONSTITUTION: THAT DELICATE BALANCE* 132 (1984).

⁹⁵ *Mapp*, 367 U.S. at 643.

⁹⁶ *See, e.g., id.* at 645 ("At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for.").

⁹⁷ *Id.* at 645.

⁹⁸ *Id.* at 669 (Douglas, J., concurring).

overruled *Wolf*, and imposed the Fourth Amendment exclusionary rule upon the states.⁹⁹

The police misconduct was egregious. Although Mapp had done no more than demand a warrant, the officers ran “roughshod” over her; they grabbed her, twisted her hand, locked her in handcuffs, and “forcibly [took Mapp] upstairs to her bedroom.”¹⁰⁰ The officers were searching for a bombing suspect, yet once inside Mapp’s home they “searched a dresser, a chest of drawers, a closet and some suitcases. . . . [and] looked into a photo album and through personal papers belonging to the appellant.”¹⁰¹ Although the apartment was on the second floor of the house, officers also searched a trunk stored in the basement and “[t]he obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.”¹⁰²

The State urged the Court to apply *Wolf*, which had established that “even if the search were made without authority, or otherwise unreasonably, [Ohio] is not prevented from using the unconstitutionally seized evidence at trial.”¹⁰³ Instead the majority held that the states now must exclude evidence seized in violation of the Fourth Amendment.¹⁰⁴ The Court’s analysis relied heavily on early exclusionary rule decisions, including *Weeks*, and frequently echoed Justice Murphy’s dissent in *Wolf*, particularly his argument that exclusion is not merely a remedy, but is an essential element of Fourth Amendment rights.

Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be “a form of words,” valueless and undeserving of mention in a perpetual charter of inestimable human liber-

⁹⁹ *Id.* at 653-56.

¹⁰⁰ *Id.* at 645.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 655.

ties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty . . ." in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.¹⁰⁵

The Court also recognized that the exclusionary rule was the mechanism by which judges fulfilled their duty to enforce the Constitution. Like *Weeks*, *Boyd*, and other early opinions, *Mapp* described this obligation in terms of enforcing constitutional judicial review.¹⁰⁶ In addition, it described this function as necessary for preserving the integrity of government institutions:

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." In some cases this will undoubtedly be the result. But, as was

¹⁰⁵ *Id.* at 655-56.

¹⁰⁶ *See, e.g., id.* at 647 (quoting *Boyd v. United States*, 116 U.S. 616, 638 (1886); I ANNALS OF CONG. 439 (Joseph Gales ed., 1834)):

In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional."

See also, id. at 649 ("There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.")

said in *Elkins*, “there is another consideration—the imperative of judicial integrity.” The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*: “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”¹⁰⁷

Justice Clark also deployed two practical arguments. First, in the five decades since *Weeks* had imposed the exclusionary rule in federal cases, “it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.”¹⁰⁸ Second, the “movement towards the rule of exclusion has been halting but seemingly inexorable.”¹⁰⁹ Since the decision in *Wolf*, more states had adopted the exclusionary rule. In 1949, “almost two-thirds of the States were opposed to the use of the exclusionary rule,” but in the ensuing years “more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule.”¹¹⁰

Of particular importance, Justice Clark wrote, was California’s adoption of the exclusionary remedy:

Significantly, among those now following the rule is California, which, according to its highest court, was “compelled to reach that conclusion because other remedies have completely

¹⁰⁷ *Id.* at 659 (citations omitted).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 660 (quoting *Elkins v. United States*, 364 U.S. 206, 218-19 (1960)).

¹¹⁰ *Id.* at 651. Other vexing shortcomings of the doctrine as it existed in 1949 had been corrected by 1961. See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960) (jettisoning the “silver platter doctrine” that allowed federal judicial use of evidence seized in violation of the Constitution by state agents); *Jones v. United States*, 362 U.S. 257, 266-67 (1960) (relaxing “the formerly strict requirements as to standing to challenge the use of evidence thus seized”), *overruled by* *United States v. Salvucci*, 448 U.S. 83 (1980); *Rea v. United States*, 350 U.S. 214 (1956) (preventing states from using evidence unconstitutionally seized by federal agents).

failed to secure compliance with the constitutional provisions . . .” In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that “other means of protection” have been afforded “the right to privacy.” *The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States.* The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*. See *Irvine v. California*, 347 U.S. 128, 137 (1954).¹¹¹

Contemporary readers may well wonder why the adoption of the exclusionary rule in just one of the fifty states was particularly important, and why the *Mapp* opinion cited the obscure *Irvine* case that originated in that state, California. In the final section of this article I propose that both questions can be answered with two words: Earl Warren.

V. *IRVINE*, EARL WARREN, AND CONSTITUTIONAL JUDICIAL REVIEW

A. *Irvine v. California*

Justice Clark's opinion in *Mapp* attracted a bare majority of five Justices. One of the five was Chief Justice Earl Warren. This vote embodied a dramatic change in Warren's attitudes about constitutional judicial review of state law enforcement activities by federal courts. Only seven years earlier, Warren was one of five Justices voting to affirm *Wolf* and not to impose the exclusionary remedy upon the states. *Irvine v. California* was the first search and seizure opinion issued by the new Warren Court,¹¹² and only a plurality actually endorsed *Wolf*'s reasoning.¹¹³

¹¹¹ *Mapp*, 367 U.S. at 651-52 (citation omitted) (emphasis added).

¹¹² *Irvine* was argued in Warren's second month on the Court. To place it in historical perspective, *Irvine* was argued only nine days before re-argument in *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹¹³ Justice Clark concurred in the decision only. Chief Justice Warren and Justices Reed and Minton joined in Jackson's plurality opinion. See also *infra* note 116 (discussing Justice Clark's concurring opinion).

The plurality opinion was written by Justice Jackson. The four-Justice plurality objected vehemently to the police methods employed in the investigation:

Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government The decision in *Wolf v. People of the State of Colorado*, for the first time established that “[t]he security of one’s privacy against arbitrary intrusion by the police” is embodied in the concept of due process found in the Fourteenth Amendment.¹¹⁴

But *Wolf* also held “that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.”¹¹⁵ Five Justices agreed that *Wolf* was controlling,¹¹⁶ and voted to affirm Patrick Irvine’s conviction, although none of the Justices endorsed the illegal police actions that produced evidence essential for the prosecution’s case against him.

Irvine had been convicted in a California court of various illegal gambling activities prohibited under state law.¹¹⁷ Police officers acting without a search warrant repeatedly trespassed into Irvine’s home to install electronic listening devices that permitted them to overhear conversations and other sounds made in the home.¹¹⁸ They first installed a hidden microphone in a hallway.¹¹⁹ They bored a hole “in the roof of the house and

¹¹⁴ *Irvine v. California*, 347 U.S. 128, 132 (1954).

¹¹⁵ *Id.* (quoting *Wolf v. Colorado*, 338 U.S. 25, 33 (1949)).

¹¹⁶ Chief Justice Warren and Justices Reed and Minton joined in Justice Jackson’s plurality opinion. Justice Clark concurred in the judgment, but wrote that had he been on the Court when it decided *Wolf*, he would have voted to impose the exclusionary rule on the states in that case. *Id.* at 138 (Clark, J., concurring). Nonetheless, Justice Clark concluded that “*Wolf* remains the law and, as such, is entitled to the respect of this Court’s membership.” *Id.* (Clark, J., concurring). The decision to affirm *Wolf* did not please him: “In light of the ‘incredible’ activity of the police here it is with great reluctance that I follow *Wolf*. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment of affirmance.” *Id.* at 139. Only seven years later, Justice Clark would write the majority opinion in *Mapp* that overruled *Wolf* on the exclusionary rule issue.

¹¹⁷ *Id.* at 129.

¹¹⁸ *Id.* at 130-31.

¹¹⁹ *Id.* at 131.

wires were strung to transmit to a neighboring garage whatever sounds the microphone might pick up. Officers were posted in the garage to listen."¹²⁰ One week later, "police again made surreptitious entry and moved the microphone, this time hiding it in the bedroom. Twenty days later they again entered and placed the microphone in a closet, where the device remained until its purpose of enabling the officers to overhear incriminating statements was accomplished."¹²¹

The trial judge allowed the officers to testify about the conversations they overheard, rejecting Irvine's arguments for exclusion. The United States Supreme Court acknowledged that each of the illegal entries "was a trespass, and probably a burglary, for which any unofficial person should be, and probably would be, severely punished."¹²² Echoing Justice Brandeis's famous dissent in *Olmstead*,¹²³ Jackson's plurality opinion concluded that

[s]cience has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted.¹²⁴

But the principles articulated in *Wolf* carried the day in *Irvine*, particularly their deference to state authority in matters of criminal justice. Most criminal cases are prosecuted by the states, and the plurality concluded that "it is for them to determine which rule best serves them."¹²⁵ Jackson's plurality opinion emphasized that the Supreme Court had first declared that freedom from unreasonable searches and seizures was a fundamental right imposed on the states by the Fourteenth Amend-

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 132.

¹²³ *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

¹²⁴ These egregious violations also failed to justify suppression under the due process "shock the conscience" standard announced in *Rochin v. California*, 342 U.S. 165 (1952).

¹²⁵ *Irvine*, 347 U.S. at 136.

ment only five years earlier.¹²⁶ A supermajority of the states had not adopted the exclusionary rule in 1949, and they should have ample time to decide whether to

reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to *Wolf* as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions.¹²⁷

Jackson also stressed the absence of evidence demonstrating that the exclusionary remedy was an effective deterrent of police illegality. This is an early example of what has become a critical argument used by suppression's opponents: "There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it."¹²⁸ Even in federal courts, where suppression had been in place since 1914, the remedy had not "put an end to illegal search and seizure by federal officers."¹²⁹ This may result from the reality that "[t]he disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best."¹³⁰

Because the Supreme Court simply reaffirmed its more important decision in *Wolf*, it is not surprising that *Irvine* has long been relegated to the backwaters of constitutional history. This

¹²⁶ *Id.* at 134.

¹²⁷ *Id.*

¹²⁸ *Id.* at 136.

¹²⁹ *Id.* at 135.

¹³⁰ *Id.* at 136-37. See also, Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835 (1999) (explaining how exclusion of evidence was adopted as a mechanism of constitutional judicial review designed to enforce individual rights in specific criminal prosecutions and not as a device for deterring police misconduct—a goal for which exclusion is not well-suited).

is unfortunate because *Irvine* set in motion events that have influenced constitutional history for more than half a century.¹³¹

It is only in the final paragraph of Jackson's opinion that we find the language that makes *Irvine* a case of note. Here we find a direct call for the use of an alternative to exclusion: prosecution of the law breakers by the relevant members of the executive branch. Only Chief Justice Warren joined Jackson in urging Justice Department action against the officers who had violated Irvine's rights. After noting that *Wolf* rested upon the theory that remedies other than suppression were adequate to protect against unreasonable searches and seizures, these two Justices asserted that one such remedy was prosecution under federal civil rights statutes. Here is the relevant language from that long-forgotten paragraph:

It appears to the writer, in which view he is supported by THE CHIEF JUSTICE, that there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting a justifiable conviction of this common gambler. If the officials have willfully deprived a citizen of the United States of a right or privilege secured to him by the Fourteenth Amendment, that being the right to be secure in his home against unreasonable searches, as defined in Wolf v. Colorado, supra, their conduct may constitute a federal crime under . . . 18 U.S.C. Supp. III § 242. This section provides that whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any state to the deprivation of any rights, privileges or immunities secured or protected by the Constitution of the United States shall be fined or imprisoned. . . . We believe the Clerk of this Court should be directed to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General

¹³¹ This article discusses the *Irvine* decision's role in producing the majority opinion in *Mapp*, an opinion still central in the debate about the constitutional limits on searches and seizures. Another important byproduct of *Irvine* is less well-known. In response to the message from Jackson and Warren requesting an investigation (and prosecution), Attorney General Brownell issued a memorandum authorizing illegal electronic surveillance by the FBI in national security cases. This memorandum continues to play a role in the constitutional debate about the legality of electronic surveillance methods used by government agencies in the twenty-first century. See Morgan Cloud, *The Bugs in Our System*, N.Y. TIMES, JAN. 13, 2006, at A1.

of the United States. However, MR. JUSTICE REED and MR. JUSTICE MINTON do not join in this paragraph.¹³²

Writing in dissent, Justice Douglas also resurrected *Wolf*, quoting from Justice Murphy's dissent and concluding that "[e]xclusion of evidence is indeed the only effective sanction."¹³³ He scoffed at the solution pressed by Jackson and Warren in *Irvine* "that the remedy for lawless conduct by the local police is through federal prosecution under the civil rights laws," in part because an "already overburdened Department of Justice, busily engaged in law enforcement, cannot be expected to devote its energies to supervising local police activities and prosecuting police officers, except in rare and occasional instances."¹³⁴ Subsequent developments seemed to confirm Douglas's arguments, and undercut those who relied upon remedies other than exclusion.

After the Supreme Court Clerk had complied with the two Justices' request and had forwarded the case file to the Attorney General, the Justice Department took no action against the officers. There was no prosecution. There was no investigation. The Department failed even to open a file on the matter.¹³⁵ The failure of the executive branch to act to enforce the law and *Irvine*'s rights had a profound effect on Earl Warren's views about the need for a remedy—like exclusion—that could be enforced by judges engaged in the process of constitutional judicial review.¹³⁶ There seems to be little doubt that the Justice Department's inaction influenced Warren's judicial philosophy, and led him to conclude that the exclusionary rule was necessary to protect individuals from illegal police actions.¹³⁷ To understand Warren's reaction, it is necessary to understand his career *before* the Supreme Court.

¹³² *Irvine*, 347 U.S. at 137-38 (emphasis added).

¹³³ *Id.* at 151 (Douglas, J., dissenting).

¹³⁴ *Id.* at 152.

¹³⁵ See, e.g., BERNARD SCHWARTZ, *SUPREME CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 137 (1983).

¹³⁶ See *infra* Part V.B-C.

¹³⁷ See *infra* Part V.B-C.

B. Career Prosecutor and Republican Politician

Earl Warren's tenure as Chief Justice has overshadowed his earlier career. Even a quick summary of his professional life illustrates why it is not surprising that early in his career on the Supreme Court Warren both deferred to the State of California in matters of criminal justice and why he believed that the Republicans in the Executive Branch could be trusted to protect individual rights. Warren was a lifetime resident of California, a longtime state prosecutor, a former Attorney General and Governor of that state, and one of the most prominent career Republican politicians of his era. He was the Republican Party's nominee for Vice-President in 1948 and a leading contender for the presidential nomination four years later. Many of the details of his overlapping careers as prosecutor and a Republican politician seem to contradict his later reputation as a liberal Chief Justice who led the Supreme Court through its most progressive era.

Earl Warren grew up in northern California. He was a mediocre student in high school, college, and law school, but earned bachelors and law degrees from the University of California in Berkeley.¹³⁸ Several years after graduating from law school, he was hired as a deputy district attorney in Alameda County, California. From 1925 to 1938 he was District Attorney of that county. Warren earned a national reputation as a prosecutor who got results, but who played by the rules (as they were defined in the 1920s and 1930s). He was known for running a clean, efficient office that secured conviction rates above both state and national averages, yet his deputy district attorneys were nicknamed "Boy Scouts."¹³⁹ He demanded that prosecutors and police officers follow legal rules, even if it meant that suspects went free.¹⁴⁰ As a prosecutor, he declared that "[w]e don't break the law to enforce the law."¹⁴¹

¹³⁸ ED CRAY, CHIEF JUSTICE 15-29 (1997).

¹³⁹ CRAY, *supra* note 138, at 48, 58-60.

¹⁴⁰ JOHN D. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 236-37 (1967); CRAY, *supra* note 138, at 67.

¹⁴¹ WEAVER, *supra* note 140, at 237; CRAY *supra* note 138, at 67.

In the political spectrum of the era, Warren was a moderate conservative, not a likely candidate for becoming a progressive judicial reformer and the namesake for the “liberal Warren Court.” During one political fight over California court appointments, a prominent liberal called him “a compound of Ku Klux, anti-semitism, witch hunting, Republican partisanship . . . [and] a thoroughly unreliable and slippery politician.”¹⁴² In fact, Warren ultimately was a partisan Republican. Although he often received support from Democrats as well as Republicans in his election campaigns,¹⁴³ he was an early and outspoken critic of the New Deal legislation. For example, he called the controversial National Industrial Recovery Act (NIRA) “the first major effort to change by stealth the greatest free government of all time into a totalitarian state wherein men are but the pawns of a dictator.”¹⁴⁴

Those familiar with Warren’s central role in the Supreme Court’s civil rights decisions of the 1950s and 1960s, beginning with his irreplaceable contributions to the unanimous opinion in *Brown v. Board of Education*,¹⁴⁵ will be surprised by his central role in the internment of 110,000 Japanese-Americans during World War II. First as California’s Attorney General and then as its Governor, Warren was an early supporter of the plan to imprison Japanese Americans. He argued that they supported Japan in the war, and would act as spies and saboteurs. He asked, for example, “who, I ask you, could tell the difference between a loyal Japanese on our coast line and a saboteur?”¹⁴⁶

Perhaps most surprising is that little more than a decade before he wrote the opinion in *Brown*, Warren made statements expressing what can only be seen as anti-Japanese racial animus. He admonished critics of the internment policy that the military has the authority in time of war “to tell me to get back 200 miles if it wants to do it, and as a good American citizen I

¹⁴² EDWARD G. WHITE, EARL WARREN: A PUBLIC LIFE 65 (1987).

¹⁴³ JACK HARRISON POLLUCK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 65 (1979).

¹⁴⁴ CRAY, *supra* note 138, at 70.

¹⁴⁵ 347 U.S. 483 (1954).

¹⁴⁶ CRAY, *supra* note 138, at 158.

have no right to complain. Now, if a good American citizen cannot complain, I don't see why the Japanese should complain."¹⁴⁷

In 1946, Warren won re-election as Governor. Two years later, he was his party's vice-presidential nominee.¹⁴⁸ At the beginning of the campaign, it was conventional wisdom that "only a miracle or a series of political blunders . . . can save Truman . . . from overwhelming defeat" by the Dewey-Warren Republican ticket.¹⁴⁹ Of course, the Republican Tom Dewey ran a hapless presidential campaign, and Truman won an improbable victory. The vote totals were so close that a change of only 29,292 votes in three states (Ohio, Illinois, and California) would have meant a Republican victory.¹⁵⁰ Warren would have been Vice President—and the front runner for the party's nomination for President at the end of the Dewey term(s). Had Dewey and his campaign manager, Herbert Brownell, been more effective, Earl Warren might have been President instead of being appointed Chief Justice by Dwight Eisenhower, his Republican rival for the party's nomination in 1952.

Although biographers have offered different versions of the events, it is undisputed that at some point during the election year of 1952 Eisenhower promised Warren the next seat on the Supreme Court. To the surprise of the principals, that vacancy was created when Chief Justice Fred Vinson died on September 8, 1953, only a month before the Court's new term would begin.¹⁵¹ Eisenhower honored his commitment, although not without some conflict over whether Warren should be appointed chief, or should wait for the next opening for an associate justice.¹⁵² Politically motivated delays in the confirmation process forced a recess appointment so that Warren could join the Court for the start of the term in October 1953.¹⁵³

¹⁴⁷ CRAY, *supra* note 138, at 119.

¹⁴⁸ CRAY, *supra* note 138, at 189.

¹⁴⁹ CRAY, *supra* note 138, at 189.

¹⁵⁰ CRAY, *supra* note 138, at 193.

¹⁵¹ HERBERT BROWNELL & JOHN P. BURKE, *ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL* (1993).

¹⁵² See, e.g., CRAY, *supra* note 138, at 246-53.

¹⁵³ See, e.g., SCHWARTZ, *supra* note 135, at 22-24.

C. Irvine's Impact on Warren

Only weeks later, the Court heard oral arguments in *Irvine*, the first search and seizure case decided by the Warren Court.¹⁵⁴ As one might expect, Warren approached the case both with the hesitancy of a new Justice and with the attitudes of a career prosecutor who had spent much of his adult life on the side of California law enforcers. Warren himself explained that although the police conduct had “shocked” him, he “went along” with reaffirmation of *Wolf* because as a “new Justice of the Court [he was] still groping around in the field of due process.”¹⁵⁵ Others have concluded that during his first term his votes in criminal justice cases reflected personal views developed during almost two decades in law enforcement.¹⁵⁶

A prominent constitutional law scholar who served as a Warren law clerk during his early years on the Court recounted how Warren changed his support for one defendant's certiorari petition after learning that the petitioner was a Chicago mobster. “No bad guy was going to get help from Earl Warren,” the former clerk concluded.¹⁵⁷ Warren's own comments confirmed his anathema for criminals. Referring to cases involving obscenity and white slavery, Warren has been quoted as saying: “I've got three daughters, and [one] is still at home. As long as I sit, I'm never going to vote for any of those pimps.”¹⁵⁸

Two aspects of Warren's law enforcement experience help explain his arguably inconsistent responses to the *Irvine* case. Eighteen years as a local prosecutor left him instinctively in favor of police and prosecutors—especially if they were from California. Yet he had been a prosecutor who “demanded his men follow the law rather than cut corners to secure convic-

¹⁵⁴ The arguments in *Irvine* were held on November 30, 1953, only seven weeks after Warren's first term on the Court began. See, e.g., SCHWARTZ, *supra* note 135, at 22-23 (noting that the Supreme Court term began on October 5, 1953).

¹⁵⁵ Anthony Lewis, *A Talk with Warren on Crime, the Court, The Country*, N.Y. TIMES MAGAZINE, Oct. 19, 1969, at 128. See also, SCHWARTZ, *supra* note 135, at 24.

¹⁵⁶ See, e.g., SCHWARTZ *supra* note 135, at 135; CRAY, *supra* note 138, at 302-03; WHITE, *supra* note 142, at 266.

¹⁵⁷ CRAY, *supra* note 138, at 302-03 (quoting Professor Gerald Gunther, who was a Warren clerk during the October 1954 term).

¹⁵⁸ CRAY, *supra* note 138, at 303.

tions.”¹⁵⁹ In 1954, fresh from more than two decades as a California law enforcement officer, he rejected the idea that the exclusionary rule was necessary to protect individual liberties. He expected that other executive branch actors, including the Attorney General, also would enforce the law against police officers who had broken the law.

Thus Warren voted to affirm *Wolf*, leaving California free to reject the exclusionary rule because he believed—based on his own practices as a public prosecutor—that other remedies were in fact adequate to protect constitutional rights. Given his vote’s consistency with his performance as a prosecutor, it is noteworthy that “Warren himself once told Edward Bennett Williams that if there was any vote he had cast as Chief Justice that he could change [*Irvine*] would be it.”¹⁶⁰

Warren’s tenure as Chief Justice spanned fifteen years in which the Court addressed some of the most controversial issues of a tumultuous era. During those years, the Warren Court often decided twice as many cases as have the Rehnquist and Roberts Courts in recent years. Yet *Irvine* was the case that stood out among hundreds as the vote he would change. One must ask what made this case so memorable to Warren? The answer is that it changed his long-held views about the need for constitutional judicial review over police searches and seizures, and therefore the need for the exclusionary rule.

In later years, Warren told his law clerks about the aftermath of the case. The impact of the Justice Department’s inaction even after the Court had forwarded the record and opinion to Attorney General Brownell taught him a fundamental lesson:

Warren repeatedly told the story of the *Irvine* case later in his career: Among the conclusions he drew was that the Court could not rely on other branches of government to remedy abuses that came to the Court’s attention. After *Irvine*, Warren rarely sustained a conviction that he thought had been unfairly obtained and never relied on law enforcement bodies to

¹⁵⁹ CRAY, *supra* note 138, at 328 (quoting Warren as saying that all he asked of the “police forces” was that they not be too lazy to do their jobs correctly)

¹⁶⁰ SCHWARTZ, *supra* note 135, at 134 (quoting Edward Bennett Williams, *Address*, 64 CAL. L. REV. 5, 8 (1976)).

discipline themselves. Seven years after *Irvine* he voted to overrule *Wolf v. Colorado*.¹⁶¹

Warren reiterated this point in an interview given soon after he retired from the Court. He had concluded after *Irvine* that if the courts failed to enforce individual constitutional rights in criminal cases, “we let them go and sweep them under the rug, only to leave them for future generations.”¹⁶²

The lesson Warren apparently took from *Irvine* was that the judges must be vigilant to identify cases brought before their courts in which the political branches had failed to vindicate constitutional rights or to remedy constitutional abuses. Judicial restraint in such cases relegated these constitutional provisions to nothing more than a “form of words,” as Justice Murphy and others had worried in earlier cases. The exclusionary rule was an essential of Fourth Amendment doctrine because it was the one remedy judges could apply regardless of the action, or inaction, of the other branches.

This does not mean, however, that the exclusionary rule is an optimally efficient device for shaping police behavior.¹⁶³ Of course it is not. Remedies aimed directly at officers who break the law seem, at least in theory, more suited to the task of deterring police misconduct. Justices Jackson and Warren were sensible in proposing that the officers in *Irvine* be subjected to criminal prosecution if the facts confirmed gross violations of Irvine’s rights. Criminal prosecution of officers who break the law, civil suits for damages brought by the victims of illegal police conduct, and the other “alternative” remedies proposed in

¹⁶¹ WHITE, *supra* note 142, at 266 (citation omitted). See also SCHWARTZ, *supra* note 135, at 136-38.

¹⁶² SCHWARTZ, *supra* note 135, at 138 (quoting TIME, July 4, 1969, at 62-63).

¹⁶³ I have argued elsewhere that:

It is axiomatic that the judicial function is to resolve disputes properly raised in litigation. Sometimes these disputes involve claims that an individual’s constitutional rights were violated, and then the courts must deal with those individual claims. But those claims properly arise within the context of litigated cases. The judicial task is to resolve the claims of the parties to the litigation, not to manage how executive branch departments train their employees.

Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835, 850 (1999).

Wolf and *Hudson* alike are rational methods for deterring police misconduct. I personally believe that if enforced rigorously, they would be more likely than the exclusion of evidence to get the attention of individual officers.

The problem is, as Justices Murphy and Breyer argued in their respective dissents in *Wolf* and *Hudson*, that one must doubt that those remedies will be rigorously enforced in any but the most egregious cases. This is true, in part, because enforcing those remedies is a task for other government actors, including police departments and prosecutors. It is not a task for judges, and it is not the reason Supreme Court Justices adopted the exclusionary rule in its seminal decisions in *Boyd*, *Weeks*, and *Mapp*.

Deterring police misconduct was not the fundamental justification for excluding evidence offered by the majorities in any of these cases. Undoubtedly, the Justices in those majorities recognized that suppression of illegally seized evidence might have the desirable side effect of educating police officers about the nature of constitutional rights and encouraging them to respect those rights. But education and deterrence were only peripheral concerns for those Justices voting to impose the exclusionary upon federal and state law enforcers. The fundamental purpose of exclusion was, instead, to protect individual constitutional rights by effecting judicial review within the contours of criminal litigation brought by the government against individual citizens—in courts where judges had the power to enforce these rights in disputes litigated before them.

The Court's decisions adopting the exclusionary rule in *Boyd* and *Weeks* did not claim that judges should undertake the task of deterring police misconduct. These opinions left this task where it belonged, within the elected branches of government and the administrative hierarchies of law enforcement agencies. Instead, both opinions defined the nature of rights protected by the Constitution and determined that in cases where government actors violated those rights, the exclusionary rule provided a remedy appropriate to the parties and issues involved in the litigation.

Irvine and its aftermath led Earl Warren to similar conclusions about the importance of constitutional judicial review of

police searches and seizures, as well as the need for *the* judicially enforceable remedy—exclusion of evidence. It may be that he was wrong; perhaps we can rely on the executive branch to act vigorously, conscientiously, and consistently to enforce our rights to privacy and liberty. Unfortunately, executive branch behavior in recent years, particularly since September 11, hardly supports that premise. Like Patrick Irvine more than fifty years ago, twenty-first century Americans have found that an independent judiciary remains as the irreplaceable guardian of individual rights.

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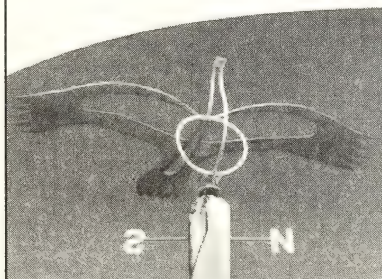
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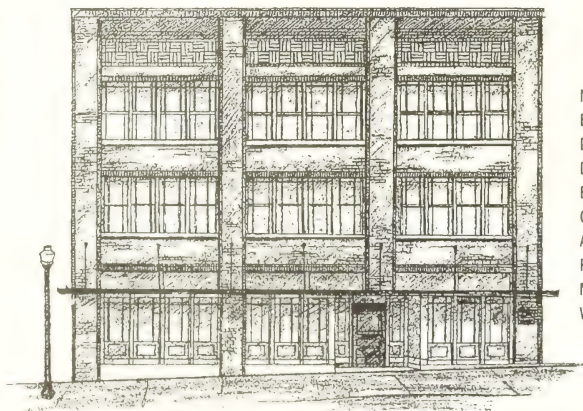
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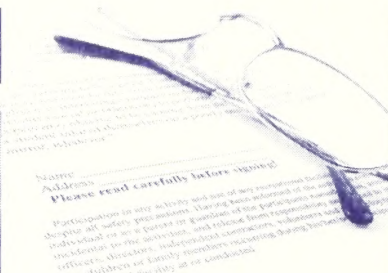


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